

CASES DETERMINED
BY THE
SUPREME COURT
OF
THE STATE OF MISSOURI
AT THE
APRIL TERM, 1885.

LEAKE *et al.* v. KING, *Appellant.*

Homestead: ABANDONMENT: HEAD OF FAMILY. A husband with his wife occupied premises in this state as a homestead, until forced to leave about the close of the war, by the disturbed condition of the country, when they removed to Iowa, where he shortly afterwards died. The wife who had no children then returned to the homestead and resided thereon, keeping house with her brother. *Held*, (1) There was no abandonment of the homestead, and (2) that she was the head of a family within the meaning of the homestead law.

Appeal from Clinton Circuit Court.—HON. G. W. DUNN,
Judge.

REVERSED.

J. M. Lowe for appellant.

(1) The defendant was the head of a family and entitled to the land as a homestead. *Brown v. Brown*, 68 Mo. 388. And she took the premises in fee on the death of her husband. 68 Mo. 388, and 57 Mo. 380. (2) There was no abandonment of the homestead. The latter must be voluntary. *Moss v. Warner*, 10 Cal. 296. Mere re-
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moval does not raise a presumption of abandonment. *Ives v. Mills*, 37 Ill. 75; *Kitchen v. Borgevin*, 21 Ill. 40; 20 Tex. 96.

Thomas E. Turney for respondents.

The debt for which the judgment was rendered was a debt of the defendant in this suit, contracted since the death of her husband. The land, therefore, if exempt as a homestead, must be so either because the defendant was or is now the head of a family. It will hardly be contended that she was the head of a family during the lifetime of her husband. She received the land from him exempt from *his* debts, because *he* was the head of a family, *she* constituting the family. The case of *Beckman v. Meyer*, 75 Mo. 333, has no application in this case. Beckman had been the head of a family, and as such entitled to the land in the suit as a homestead. By death and other causes the family no longer existed, and the court very properly said that the homestead right once acquired was not lost to Beckman, who was still residing on the land. But in this case the appellant is the head of a family *now*, or she never has been. The evidence shows that the appellant, who is sixty-five years of age, is living on the land, and that an unmarried brother of sixty is living with her. There is no evidence that either is dependent on the other. It is insisted that this evidence is not sufficient to establish the existence of a family. There is neither a legal nor moral obligation on either to support the other. Thompson on Homesteads, secs. 45 and 46. But for the fact that they have a common residence, the idea that they constitute a family would never have been entertained by any one. *Whalen v. Cadmen*, 11 Iowa 226.

PER CURIAM.—This is an action of ejectment to recover possession of the southeast quarter of the northeast quarter and the northeast quarter of the southeast

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quarter of section eighth, township fifty-five, range thirty. The answer was a general denial.

The plaintiffs, it seems, are step-sons of the defendant. In October, 1880, they commenced a suit before a justice of the peace against the defendant on an account and recovered judgment for one hundred and two dollars; filed a transcript of the judgment in the office of the clerk of the circuit court, sued out execution therefrom and levied on the land in controversy; bought it at that execution sale, and brought this suit for recovery of possession. To maintain the issues on their part, plaintiffs read in evidence the sheriff's deed.

Defendant then introduced Edwin Leake, one of the plaintiffs, who testified as follows: "Defendant is my step-mother; the land in controversy was the property of my father at the time of his decease. He and defendant, his wife, resided upon it and occupied it as their home up to and during the war. About the time of the close of the war, or just after, my father and family left on account of the perilous condition of the country, and went to Iowa, where he shortly afterward died. Defendant returned immediately and has lived on the land in controversy ever since. My father never bought land anywhere else. Defendant is about sixty-five years old."

Mr. Sweat: "Defendant is my sister. She and her husband, now deceased, left the land in controversy about the close of the war on account of the unsettled condition of the country, as testified by plaintiff. Her husband died, seized of the land in controversy on the twenty-first day of April, 1866. Defendant, immediately after her husband's death, returned to their former home, and has lived on the land in controversy ever since. Her husband, before his death, nor has she since acquired any other homestead. No children were born to them, nor has she ever had any. Defendant and myself constituted all the family since the death of her husband.

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She is about sixty-five years of age. I am sixty and unmarried."

The defendant then asked the following declaration of law: "The court declares the law to be that under the pleadings and evidence, the judgment must be for the defendant," which the court refused.

There was some other evidence, which it is not important to notice, as it cuts no figure in the determination of the case. There was judgment for the plaintiff, from which the defendant appeals to this court.

I. The only important and controlling question in this case is, as to the exemption of the land under the homestead law. And it does not seem under the facts and circumstances of this case a solution of that question should be difficult. The evidence tends to prove, and, indeed, there is no controversy about the facts, that the defendant's husband was the owner of the land in 1866, and he and defendant, as husband and wife, were then residing on it, and as far as this case shows, he was not in debt. The plaintiffs, the sons of the husband, resided with their father. That, during that year (1866) as one of the plaintiffs swears, "my father and family left on account of the perilous condition of the country and went to Iowa, where he shortly afterwards died. Defendant returned immediately and has lived on the land in controversy ever since. My father never bought land anywhere else. Defendant is about sixty-five years old." This state of facts would not constitute abandonment of the homestead, and no point of that kind is made by the respondent. Thompson on Homestead, sec. 263, *et seq.* Here the defendant left the homestead by reason of "the perilous condition of the country," and the childless wife "immediately" returned after the death of her husband.

II. But the point relied on by the respondent is, that the defendant is not "the head of a family," and, hence, cannot take advantage of the homestead law. And

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to sustain his position, refers to *Whulen v. Cadman*, 11 Iowa 226, which, we think, is an authority just to the reverse. The language of the statute is: "The homestead of every housekeeper, or head of a family, consisting of a dwelling house," etc. R. S. 1879, sec. 2689. The reading of the exemption under executions is different, to-wit: "when owned by the head of the family." R. S., sec. 2343. But the case of *Brown v. Brown*, 68 Mo. 388, decides that where the owner of a farm rented it, and occupied but one room in the house, upon an agreement with a tenant that he and his family should come into the house, and keep house, that that did not make the tenant the head of the family within the meaning of the homestead law. In that case the wife had abandoned her husband before his death, and they were not living together at the time of the husband's death, and the husband died in a few months after the arrangement was made with the tenant. It was held the wife could claim the homestead. In *Beckman v. Meyer*, 75 Mo. 333, it is said: "It seems to be settled, on general principles, that a homestead once acquired by the head of a family will not be defeated or lost by the death or absence of his wife or children, if he continues to occupy it." *Silloway v. Brown*, 12 Allen 30; *Taylor v. Boulware*, 17 Tex. 74; *Myers v. Ford*, 22 Wis. 139.

In the case at bar the evidence clearly shows that the husband had lived on the premises with his wife, until forced to leave by the disturbed condition of the country. That immediately after his death, his wife returned to the homestead and resided there for something like fourteen years, keeping house with her old brother, but was without husband or child. That she is first sued by her step-sons, the plaintiffs, for a debt of one hundred and two dollars, and her land sold and bought in by them, and now it is said she is not the head of a family and cannot claim her homestead. Because she was so unfortunate as to lose her husband, and had no children

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of her own; and no other family except her brother, now she is to be deprived of her homestead and turned out into the world. The humane provisions of the homestead law were intended to secure a habitation and dwelling place for a man and his wife and family against the demands of their creditors. And especially to secure the helpless children and aged widow against the rapacity of creditors who would turn them adrift upon the world, without where to lay their heads. When this result is reached by the law, it must be by no doubtful or strained construction.

We think the circuit court erred in refusing the instruction asked by the defendant. The evidence fully justified it. The judgment is reversed and the cause remanded with directions to the circuit court to enter judgment for the defendant.

SMITH, *Appellant*, v. THE ST. LOUIS & SAN FRANCISCO
RAILWAY COMPANY.

1. **Neligence : RAILROADS : CONTRACT : PASSENGER.** By the terms of a written contract entered into between the Missouri Pacific Railway Company and the defendant, the passenger trains of the latter were to be drawn over the road of the former between the town of Pacific, defendant's eastern terminus, and the city of St. Louis; the Missouri Pacific Company using its own locomotive and crew of same, and the defendant furnishing at its own expense all train men for the care and management of its trains, the manner of running the latter and the control and acts of said train men being subject to the rules and regulations of the Missouri Pacific Company while so running on its track. *Held*, there could be no recovery against defendant for the death of a passenger caused by the failure of the train to stop long enough for the deceased to alight at his destination and while the train was being operated between St. Louis and Pacific, the deceased having purchased his ticket from the Missouri Pacific Company, and for transportation between St. Louis and the town of Webster where the accident occurred. (Black and Norton, JJ., dissenting).

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2. — : —. Under the contract between the two companies, the train by which the deceased was killed cannot be regarded as defendant's train in such a sense as to make it liable for the accident.
3. **Railroad : NEGLIGENCE.** If the deceased was lawfully on defendant's train and it had been operated by servants under its control, the defendant would be liable for an injury occasioned by the negligence of such servants, and this, too, irrespective of the company from which the ticket was purchased.

Appeal from St. Louis Court of Appeal.

AFFIRMED.

The following were the instructions given by the trial court for the plaintiff :

"1. If the testimony shows that the cars composing the train which caused the death of plaintiff's husband belong to the defendant, and also shows that such train was, at the time of the accident, under the care and control of the defendant's agents and employes, then the defendant's liability to this action has been established. And the jurors are instructed that if the evidence shows that the conductor and brakeman in charge of the train at the time of the accident were under the exclusive control and supervision of the defendant corporation as to compensation and service, then the train was under the care and control of the defendant's agents and employes."

"2. The court further instructs the jury, as a matter of law, that the liability of a railroad company engaged as a common carrier of passengers, continues, not only while the passengers are in transit, but also so long as the passengers are in the reasonable act of leaving the cars and premises of the common carrier, on arrival at their place of destination."

"3. The jury are further instructed, that the law makes it the duty of railway companies engaged as common carriers of passengers, to cause their depots and stations where passengers are accustomed to arrive

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and depart, to be so lighted at night that passengers could leave the cars and premises of such common carrier with reasonable safety; that railroad companies, owing to the dangerous character of the business they are engaged in, are held to the greatest possible care in the carriage of passengers, and are held responsible in law for the slightest neglect resulting in injury to passengers."

"4. The jury are further instructed, that though the deceased may have remotely contributed to the injury which caused his death, yet, if the defendant, its agents or servants in charge of said train of cars, could, by the exercise of care and prudence, have prevented the injury and death, then the defendant would be liable in this action, and the jury should find for the plaintiff, and their verdict should be for the sum claimed in the petition."

"5. The jury are further instructed, if they find from all the evidence of the case, that the agents or servants of the defendant were guilty of negligence in their management of the train of cars on which the deceased was a passenger, as stated in the petition, and that in consequence alone of such negligence, the deceased received injuries that caused his death, then the plaintiff would be entitled to recover in this action."

"6. The jury are instructed if they find from the evidence that the defendant was the owner of the car or cars on which said Geo. E. Smith was a passenger, and that the train of cars was in charge of a conductor in the employ of the defendant; and if the jury further find from all the evidence that said train of cars was drawn by a steam engine belonging to the Missouri Pacific railway company and the engineer thereof in the employ of the Missouri Pacific Railway Company; and if the jury further finds from the evidence that defendant's cars were so drawn over the road of the Missouri Pacific Railway Company, in pursuance of a private agreement and arrangement between the de-

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fendant and the said Missouri Pacific Railway Company; then the defendant would be liable in this action for negligent injury done said Smith as such passenger, that is for such injury as the evidence shows to have been occasioned by the negligence of the defendant's agents and employes."

"7. The jury are instructed as a matter of law, that a passenger is entitled to a reasonable time and to reasonably safe facilities for leaving the car in which he has been riding when a train is stopped for that purpose; and in ascertaining what would be a reasonable time and reasonably safe facilities, the jury should consider the time and place of alighting with all the facts and circumstances bearing upon the question, whether the time of stopping was reasonable and the place reasonably safe."

The instructions given at defendant's instance were as follows:

"1. The court instructs the jury that if the jury believe from all the evidence in this case that the defendant, the St. Louis & San Francisco Railway Company, had upon the first day of January, 1879, and at the time of the accident complained of, a contract with the Missouri Pacific Railway Company for the transportation of its cars, freight and passengers, over its line of road from Pacific or Franklin to the city of St. Louis, and that by the terms and conditions of such contract the management, control and direction of cars, agents and servants between said points aforesaid, were under the sole management and control of the Missouri Pacific Railway Company, and if you further believe that said accident occurred at a point between said city of St. Louis and Pacific, then your verdict and finding must be for the defendant."

"2. That if Smith's negligence in not getting off the train in due time, if you believe he was negligent in that particular, directly contributed to the injuries com-

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plained of, then, and in that case, plaintiff cannot recover in this action."

"3. The court instructs the jury that if they believe from all the evidence in the case, that the train stopped a sufficient length of time at the depot to allow Mr. Smith to get off the same and on the platform, if he had exercised due care and diligence in doing so, then and in that case plaintiff cannot recover in this action."

C. F. Moulton, Franklin Ferris and Edwin Silver for appellant.

(1) The action of plaintiff was founded on Revised Statutes, section 2121, which provides in express terms that the corporation in whose employ the agent or employe shall be at the time of the injury shall be the party liable. *Proctor v. Ry.*, 64 Mo. 123. (2) Whether or not the relation of employer and employe existed between the conductor and defendant at the time of the accident was a pure question of fact for the jury. *Pomeroy v. Singerson*, 22 Mo. 177; *Robinson v. Walton*, 58 Mo. 380; *Middleton v. Ry.*, 62 Mo. 581; *Beake v. Ry.*, 34 Conn. 481; *Hankerson v. Lombard*, 35 Ill. 572; *Packet Co. v. McCue*, 17 Wallace, 509; *Norris v. Koheer*, 41 N. Y. 4; *Crockett v. Calvert*, 8 Ind. 128; *Fenton v. Packet Co.*, 8 A. & E. 544-5. (3) And the question of fact was submitted to the jury under instructions asked by defendant as well as by plaintiff, and the cause was thus tried on defendant's own theory and it is now estopped to complain of the submission of the cause on its theory and the finding of the jury thereon. *Crutchfield v. Ry.*, 64 Mo. 225; *Leabo v. Goode*, 67 Mo. 126; *Davis v. Brown*, 67 Mo. 313; *Chamberlain v. Smith*, 1 Mo. 482; *McGongle v. Daugherty*, 71 Mo. 259. The case stands thus: Whether or not the conductor was defendant's servant at the time of the accident was by all the authorities a pure question of fact; the defendant on the trial adopted this theory and asked an instruction, which the court gave, placing the question before the jury, and the

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jury under the evidence found the issue for plaintiff, which finding the trial court refused to disturb, yet the court of appeals holds that defendant's own theory of the cause was wrong and relieves him from it in the face of all the authorities holding a party is bound by the theory it adopts. (4) Where a contract is offered in evidence, as in this case, as the foundation for an inference of fact, viz.: Whether the conductor was in defendant's employment (and that it was so offered is clear from defendant's first instruction), the inference to be drawn from such contract is for the jury. *Primm v. Haren*, 27 Mo. 205; *Wilson v. Board of Education*, 63 Mo. 142. (5) By the very terms of the contract between the defendant and the Missouri Pacific Railway Company offered in evidence by the former, it was to furnish at its own expense "all train men for the care and management of its trains" between St. Louis and Pacific. By the very terms of this contract the conductor was in defendant's service at the time of the accident and the authorities uniformly hold the defendant liable under a state of facts like those here presented. *McHugo v. Ry.*, 5 Reporter 342; 2 Thompson on Negligence, 462; *Dalyell v. Tyer*, 96 Eng. Com. Law 859; *Joslin v. Ice Co.*, 50 Mich. 515; *Mills v. Orange, etc., Ry.*, 1 McArthur 285; *Nashville, etc., Ry. Co. v. Carroll*, 6 Heisk. 347; *Webb v. Ry.*, 59 Me. 136; *Kelley v. Mayor*, 11 N. Y. 432; *Durst v. Burton*, 47 N. Y. 167. (6) If the servants of both companies control the train jointly, both companies would be liable, as it has been held. *Barrett v. Third Ave. Ry. Co.*, 45 N. Y. 628; *Vary v. B. C. Ry. Co.*, 42 Iowa, 246; 5 Waits' Actions and Defences. 334, 335; *Wabash, etc., Ry. v. Shacklett*, 105 Ill. 364. (7) The defendant and the Missouri Pacific Railway could not by contract so change the relation of the conductor between themselves as to bind third persons and the public. *P. W. & B. Ry.*, 58 Md. 372. (8) Even if said contract could so affect third persons and the public it could not be changed by parol evidence as defendant seeks to do.

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Koehring v. Muemminghoff, 61 Mo. 403; *Hagar v. Hagar*, 71 Mo. 610. (9) In obeying the running orders of the Missouri Pacific company the conductor was in fact obeying the defendant who directed him so to do for the time being. *Dowling v. Allen*, 74 Mo. 19. (10) There was no demurrer to the evidence offered by defendant and hence the case was one for the jury to pass on. (11) The declarations of deceased accounting for his injuries were properly received in evidence. *Brownell v. Ry.*, 47 Mo. 238; *Entwhistle v. Fighner*, 60 Mo. 214; *Harrison v. Stone*, 57 Mo. 93. (12) It is the duty of common carriers of passengers on railroads, on dark nights, to light the depot platform with a reasonably safe light, so passengers may approach and depart thereupon with safety. *Patton v. Ry.*, 32 Wis. 524; *Corkle v. London & S. E. R. L. R.*, 7 C. P. 321; Wharton on Neg., sec. 376, and note. *McDonald v. Ry.*, 26 Iowa 138. And this, whether the train is being operated over the carrier's own road, or over that on which it has running powers. *Martin v. Great N. Ry.*, 16 C. B. 179; Wharton on Neg., sec. 8210, note 10.

John O. Day for respondent.

(1) The test of liability in this case is: (a) With whom did Smith make his contract to carry him from the Union depot to Webster Grove? (b) Who had the exclusive management and control of the train and of the men engaged in running it? If defendant had not the exclusive charge and control of the train and the men engaged in running it, then while so occupied they were not the servants of defendant, and defendant company is not responsible for their negligence. *Shopman v. Boston & Worcester Ry. Co.*, 9 Cush. 24; *Schweickhardt v. City of St. Louis*, 2 Mo. App. 571; *Yeager v. Warren*, 31 Pa. St. 319; Wood on Master and Servant, secs. 281, 306, 313, 314, 315, 316, 317; *Sproul v. Augustus*, 14 Pick. 1; 2 Thompson on Negligence, p. 892, sec. 12; *Paulch v. Rutland*, 28 Vt. 297; *McGuise v. Grant*, 25 N. J. L. 357; Wood

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v. Cobb, 13 Allen, 58; *Kembell v. Cushman*, 103 Mass. 194; *Michael v. Stanton*, 3 Hun 462. (2) The relation existing between defendant and the Missouri Pacific Railway Company, was that of contractor and contractee. Defendant had no power to interfere with the mode or manner of doing the work, or conduct of those engaged in it while so employed. Hence, under no circumstances, can defendant be held liable to plaintiff. *Barry v. St. Louis*, 17 Mo. 121; *Hilsdorf v. St. Louis*, 45 Mo. 94; *Clark v. Han. & St. Jo. Ry.*, 36 Mo. 202; *Morgan v. Bowman*, 22 Mo. 538; *Bissel v. Roden*, 34 Mo. 63; *Schweickhardt v. City of St. Louis*, 2 Mo. App. 571. (3) Where the preponderance of the evidence is so decidedly in favor of the defeated party as to lead naturally to the conclusion that injustice has been done him by the judgment, a new trial should be granted. *Price v. Evans*, 49 Mo. 396; *Morris v. Sherrill*, 63 Barb. 21; *Townsend Manfg. Co. v. Foster*, 41 N. Y. (2 Hand.) 620, *n*; *Townsend Manfg. Co. v. Foster*, 51 Barb. 346; *Dalsen v. Arnold*, 10 Howard Pr. Rep. 528; *Adsil v. Wilson*, 7 Howard Pr. Rep. 64; *Newton v. Pope*, 1 Cowan, 109. (4) If there is mutual contributory negligence, neither party can recover. *Stoneman v. A. & P. Ry. Co.*, 58 Mo. 503; *Huelsenkamp v. Citizens' Ry. Co.*, 36 Mo. 418; *Huelsenkamp v. Citizens' Ry. Co.*, 37 Mo. 537; *Leddy v. St. L. Ry. Co.*, 40 Mo. 506; *Harlan v. St. L., K. C. & N. Ry.*, 65 Mo. 22; *Holman v. C. & R. I. Ry.*, 62 Mo. 22; *Wood v. Andrews*, 3 Mo. App. 275; *Myers v. C., R. I. & P. Ry.*, 59 Mo. 223; *Nolan v. Shickel*, 3 Mo. App. 300; *Schabbs v. W. S. W. Co.*, 56 Mo. 173. (5) To make defendant liable where plaintiff also has been negligent, it must be shown that the proximate cause of the injury was defendant's omission after becoming aware of plaintiff's danger to use a proper degree of care to avoid injuring him. *Karle v. K. C., St. J. & C. B. Ry. Co.*, 55 Mo. 476; *Isabel v. H. & St. Joe Ry.*, 60 Mo. 475; *Maher v. A. & P. Ry. Co.*, 64 Mo. 267. (6) The mere fact that the Missouri Pacific Railway Com-

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pany was to receive a certain portion of the earnings of the St. Louis & San Francisco Railway Company, for certain services rendered by it for that company, does not constitute them partners. *Mohawk & Hudson Ry. Co. v. Niles*, 3 Hill, 162; *Wiggins v. Gorham*, 51 Mo. 17; Story on Partnership (2 Ed.) secs. 18, 19, 20, 21, 30, 40; *Lucas v. Cole*, 57 Mo. 143; Collyer on Partnership (2 Ed.) Bk. Ch. 1, sec. 1, p. 11; *Whitehill v. Shickle*, 43 Mo. 537. (7) The master is not liable where machinery is used contrary to his orders. *Haack v. Fearing*, 5 Rob. (S. C.) 528; *Garretson v. Duencle*, 50 Mo. 104; *Cousin v. Ry.*, 66 Mo. 572; *Snyder v. Ry.*, 60 Mo. 413. (8) A carrier of passengers is only required to exercise such care and diligence as a prudent man would under the same circumstances. *Sawyer v. H. & St. Joe Ry. Co.*, 37 Mo. 240; Sherman & Redfield on Negligence, sec. 266; *Gilson v. J. H. R. Co.*, 76 Mo. 282; *Simmons v. N. B. V. & N. S. Co.*, 97 Mass. 368; *Derrwort v. Toomer*, 21 Conn. 245; *Marvin v. Ry.*, 36 N. Y. 378; *Straus v. Ry.*, 75 Mo. 191. An instruction, therefore, "that the carrier was liable for injury to a passenger * * * unless it used the greatest possible care and diligence," is erroneous. *Gilson v. J. H. Ry. Co.*, *supra*. (9) The court erred to the prejudice of defendant in giving the second, third and seventh instructions on the part of plaintiff. There is not a *scintilla* of evidence that the defendant company had any charge or control over the depot or the lighting of it, or power to light it if he desired to do so. *Condon v. M. P. Ry. Co.*, 78 Mo. 568; *Utley v. Tolfree*, 77 Mo. 307; *Price v. H. & St. J. Ry. Co.*, 77 Mo. 508; *Chubbuck v. H. & St. Jo. Ry. Co.*, 77 Mo. 591; *Bonine v. City of Richmond*, 75 Mo. 437; *Bowen v. H. & St. J. Ry. Co.*, 75 Mo. 426. (10) The court erred in giving the fifth instruction for plaintiff. By it the jury are told that if the defendant was guilty of negligence in the management of the train or cars in the manner stated in plaintiff's petition, then plaintiff could recover. It is erroneous for the court to give the jury what are mere abstractions.

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Zimmerman v. Ry., 71 Mo. 490; *Young v. Ry.*, 79 Mo. 341; *Goodwin v. Ry.*, 75 Mo. 75; *Kendig v. Ry.*, 79 Mo. 208; *Flynn v. Ry.*, 78 Mo. 211. (11) The giving of the sixth instruction on part of the plaintiff is reversible error. By this instruction the jury is directed to find for the plaintiff if the defendant was guilty of *negligently injuring Smith*; while in plaintiff's petition the negligent acts are confined to *a failure to light the depot, a failure to stop the train a sufficient length of time, and lastly, in the negligent starting of the train*. The instruction should have been confined to the issues of negligence made by the pleadings. *Under the instruction as given, no matter what the character of the negligence, the jury was bound to find for the plaintiff.* *Ely v. St. L., K. C. & N.*, 77 Mo. 34; *Buffington v. A. & P. Ry.*, 64 Mo. 246; *Eden v. H. & St. Jo. Ry.*, 72 Mo. 212; *Waldhier v. H. & St. Jo. Ry.*, 71 Mo. 514; *Carson v. Cummings*, 69 Mo. 325; *Kenny v. H. & St. Jo. Ry.*, 70 Mo. 252; *Bank v. Murdock*, 62 Mo. 70. (12) The court erred in refusing to give the instructions asked for by the defendant. The instructions refused correctly declared the law, and were warranted by the evidence. (13) There is irreconcilable conflict between the instructions given on behalf of the plaintiff and on behalf of the defendant; they were inconsistent and repugnant, and the giving of them was error. *Price v. H. & St. J. Ry. Co.*, 77 Mo. 508; *Gilson v. J. H. Ry. Co.*, 76 Mo. 287; *Henschen v. O'Bannon*, 56 Mo. 289; *State v. Nauert*, 2 Mo. App. 295. (14) Upon the uncontradicted evidence in the case the verdict should have been for the defendant. There was no evidence to go to the jury. It was the court's duty and it should have told the jury that under the facts plaintiff was not entitled to recover. *Powell v. Ry.*, 76 Mo. 80; *Lenox v. Ry.*, 75 Mo. 86; *Price v. Ry.*, 77 Mo. 508. A jury cannot wilfully disregard the testimony of an unimpeached witness. *Robinson v. Doyle*, 26 Ill. 161; *H. Ins. Co. v. Gray*, 80 Ill.

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HENRY, C. J.—The defendant owns and operates a railroad whose eastern terminus is the town of Pacific, about thirty miles west of St. Louis, and its trains are hauled back and forth between Pacific and St. Louis by the Missouri Pacific Railway Company over its road, under a contract between the companies, in substance as follows: First. The Missouri Pacific Railway Company, party of the first part, agrees to furnish for defendant for five years, commencing January 1, 1879, “depot facilities for the handling of defendant’s freight, and office room for its agents and clerks.” “Second. The said party of the first part agrees * * * to transport all of the passenger trains of defendant passing to and from St. Louis, to and from the point of junction of the roads of the parties of the first and second part, at Franklin or Pacific, and the Union depot at St. Louis.” “The party of the first part to furnish at its own expense the locomotive and crew of same,” and defendant to “furnish at its own expense all train men for the *care and management of said trains.*” Defendant’s “trains, and the control and acts of said train men” are “subject to the rules and regulations” of the Missouri Pacific; that defendant should “clean and care for the inside of its trains,” and, also, defendant to pay “all expenses made and incurred on account of the use and occupation by its trains of the property and facilities of the Union Depot Company at St. Louis.” Third. The Missouri Pacific to “transport all of the freight trains and freight cars” of defendant “passing between St. Louis and Pacific at its own expense.” Fourth. Missouri Pacific to transport all “passenger cars and trains” of defendant “with all reasonable promptness and dispatch;” the defendant to “furnish free of mileage or other expense all the passenger or freight cars for the performance of its business between” St. Louis and Pacific. Fifth. The defendant agrees to indemnify the Missouri Pacific “against all loss or liability” on account of “any accident or damage” received on the

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road "through the fault or negligence" of the defendant, "or its agents or employes." Sixth. For the services so rendered by the Missouri Pacific for the first two years defendant agrees to pay "eleven per centum," and for the balance of the time "eleven and one-half per centum" of the "entire amount of all the gross earnings of the defendant made and received by it on any and all of its *passenger*, freight, or other business which passes or is transported over the road" of the Missouri Pacific. The Missouri Pacific to "have access to the books and vouchers" of the defendant to "ascertain the amount of the gross earnings provided for in this agreement." Which contract was, on the day aforesaid, signed and their respective corporate seals affixed.

On the twenty-fifth of June, 1879, George E. Smith, husband of plaintiff, took passage at St. Louis on a train of cars owned by defendant, except the locomotive, which belonged to the Missouri Pacific, to go to Webster, a station on the Missouri Pacific Railroad between St. Louis and Pacific, under a commuter's ticket purchased by him of the Missouri Pacific Railroad Company. The train arrived at Webster about ten o'clock at night and stopped at the depot for passengers to get on and off. It was a dark night and the depot was not lighted, and in the act of getting off, or immediately after getting off, Smith fell between two of the cars, and at that moment the train started, and passing over him inflicted injuries of which he died soon after, and his widow instituted this suit against the defendant to recover damages. The negligence alleged is that the train did not stop long enough to allow the deceased a reasonable time to alight, and that the depot was not lighted.

The principal and controlling question in the case is, whether, under the agreement between the companies, the train in question passing over the Missouri Pacific road between Pacific and St. Louis is to be regarded as defendant's train in a sense that makes it liable for injuries occasioned to the deceased by the negligence of the

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train men. If answered, as we think it must be, in the negative, the judgment should be affirmed. By the terms of the contract the train of the defendant company was to be drawn over the Missouri Pacific road by the Missouri Pacific Company, the latter using its own locomotive and crew, and the train men to be furnished by the defendant, but the Missouri Pacific Company reserved the entire and exclusive control and management of the train, the crew, and the train men. The contract for transportation was not made by the deceased with the defendant, but with the Missouri Pacific Company. It was not for transportation over any portion of defendant's road, but from St. Louis to Webster over the Pacific road. If deceased had been a passenger from a point on defendant's road under a contract for transportation to St. Louis, or from St. Louis to a station on its own road, another question would arise which it is not necessary to consider in this case. We are not to be understood as deciding that the fact that deceased bought his ticket from the Missouri Pacific Company is conclusive against plaintiff's right to recover in this action, for, as held by the court of appeals, if he was lawfully on defendant's train, and it was operated by servants under its control, it matters not of which company he purchased the ticket, the defendant would be liable for any injury received by him occasioned by the negligence of its employees.

The case, therefore, turns upon the construction of the contract between the two companies. Parol evidence was properly admitted to show the meaning of the phrases "train men" and "crew," as employed in the contract, and to show what are the duties of conductors and other train men; and aside from the parol testimony of those employees that they were in the employment of the Missouri Pacific Company, the admissibility of which is questionable since that is a question to be determined by the written contract, in our opinion, by the terms of the contract the train men were in the employment and under the control of the Missouri Pacific Company while the

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train was passing over its road between St. Louis and the town of Pacific. This is so provided in express terms in the contract. The defendant was, by the agreement, to furnish free of all expense to the Missouri Pacific all the passenger and freight cars for the performance of its business between St. Louis and Pacific. It was no part of the defendant's business to carry passengers from St. Louis to any station between St. Louis and Pacific. It received no part of the money paid to the Missouri Pacific for carrying such passengers. It had no connection with the Missouri Pacific in that business, and that the latter company used defendant's cars and train men in the prosecution of such business did not create a liability on the part of defendant, the Missouri Pacific Company having reserved exclusive control of the train men and the train.

The fifth clause of the contract, by which defendant agreed to indemnify the Missouri Pacific Company "against all loss or liability" on account of "any accident or damage" received on the road "through the fault or negligence of the defendant or its agents or employes," giving it its broadest scope, does not alter the relation of the two companies to passengers from St. Louis to any station between that and Pacific. If it be so construed that if the plaintiff in this case had sued the Missouri Pacific Company and recovered a judgment, the defendant would be liable to the Missouri Pacific, it is but a contract of indemnity, which, of itself, cannot create a liability on the part of defendant to such a passenger. That by the agreement, the Missouri Pacific Company was to pay no part of the wages of the train men who were to be furnished by defendant, does not create a liability on the part of the defendant to a passenger from St. Louis to a station between that and Pacific, any more than an agreement between the Missouri Pacific Company and an individual, by which the latter should assume the payment of the train men on one of its trains, the company, as in this contract, reserving to itself the control of the train and train men, and the movements of

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the train, would render such individual liable for injuries received by one through the negligence of such employes.

Counsel for appellant cite *Kelly v. The Mayor, etc.*, 11 N. Y. 432, and *Durst v. Burton*, 47 N. Y. 167, in support of the proposition that the train men were acting under the supervision of the Missouri Pacific Company; that fact would not make them agents of that company. *Kelly v. The Mayor* is an authority against the plaintiff's claim here. There the city of New York had ordered a street to be graded, and contracted with an individual to do the work, and it was held that the city was not liable for damages caused by negligence of workmen employed by the contractor, notwithstanding by the terms of the contract the work was to be done under the direction and to the satisfaction of certain officers of the city. There the city employed another to do its work, reserving the right to have the work done under its direction and to its satisfaction. Here the Missouri Pacific was doing its own work with absolute control of the agencies employed, responsible to no superior for the manner of doing it, and that it hired those agencies from, or that they were gratuitously furnished by another, cannot alter its relation to passengers or the public, or establish a relation between the passengers or the public, and the corporation or individual furnishing such agencies.

In *Durst v. Burton*, defendants represented an association owning a cheese factory, which they leased to one who contracted to manufacture cheese for them at an agreed price per pound, defendants reserving no right of supervision, but carrying on the business by furnishing the materials and taking and selling the product in the market as an article manufactured by them. And they were held liable for the fraud of their lessee in the manufacture of a lot of cheese sold by them. The difference between that and the case under consideration is too palpable to require more than a statement of the foregoing facts. The defendants there held themselves out

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to the world as the manufacturers of the cheese, sold it as such, and were, of course, liable in the action brought against them. No analogous facts are found in this record. By no act or transaction did defendant assume to carry passengers or freight from St. Louis to any point on the Missouri Pacific road. The principle invoked by appellant has application only where the party supervising a given work is acting, not as principal, but in subordination to another in whose service he is engaged.

One ground of negligence averred in the petition is the failure to light the depot at Webster, a matter in which defendant had no authority whatever, and we mention it only to show where the doctrine contended for by appellant would lead, for there is no question if what appellant claims to be the law be conceded that the defendant would be liable, if the only negligence alleged and proved as causing the injury to the deceased was the failure to have a light at the depot for the benefit of persons getting on or off the train. The court of appeals held that the circuit court erred in refusing an instruction asked by defendant, virtually withdrawing the case from the jury, and we are all agreed that the judgment of the court of appeals should be affirmed, except Sherwood, J., absent.

On Re-hearing.

HENRY, C. J.—We adhere to the opinion heretofore delivered in this cause. It is pertinently asked if two persons sitting on the same seat in a car are injured in a railroad accident, can it be that one must look to one company and his companion to a different company for redress? Why not? In the case at bar the defendant company did not undertake to carry passengers from St. Louis or Pacific to points between those stations. It received no part of the money paid to the Missouri Pacific Railway Company by such passengers. The train was not under its control or management, but under that of the Missouri Pacific. If the general manager of the

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defendant had ordered conductor of the train in question not to receive such passengers, and one had entered the car, having a ticket from the Missouri Pacific Company, and the conductor should have been in the act of expelling him from the train, could he have disobeyed an order from the manager of the Missouri Pacific to let the passenger remain? Was not the order from the latter to receive and carry such passengers, one which he was bound to obey? A part of the rolling stock of the train was owned by the defendant. The locomotive was owned by the Missouri Pacific, which also owned the road. The train men, though in the permanent employment of the defendant, were, while moving the train from St. Louis to Pacific, under the exclusive control and management of the Missouri Pacific, and the engineer and fireman were in the permanent employment of the latter company. Not an order could the defendant company have given as to the running of that train between St. Louis and Pacific. Not a passenger was received by defendant company to be transported between those points. The deceased had purchased his ticket of the Missouri Pacific Railway Company.

There were no contractual relations between him and the defendant. The conductor would have subjected the Missouri Pacific to a suit for damages had he ejected the passenger from the train, and would himself have been liable to that company for any damages recovered by the passenger against the Missouri Pacific for such ejection. Could he have sued the St. Louis & San Francisco Company for such ejection? That company had not undertaken to carry him. It was not doing any such business between St. Louis and Pacific, and clearly he would have had no cause of action against the defendant, but must have sought redress from the Missouri Pacific. Whether to a through passenger who had procured a passage from the defendant company, the latter would have been liable for any injury sustained between St. Louis and Pacific in consequence of the negligence of those operating the

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train, is not a question in this cause, and it is proper to abstain from deciding that question until it is properly before us. Upon what principle the St. Louis & San Francisco Company can be held liable in this case I cannot conceive. It certainly would be an anomaly to hold one responsible for the acts of another, over whom he had no control. Such a principle obtains in no civil action between individuals, and no reason can be assigned why it should apply in suits against corporations.

On a critical examination of the cases relied upon to sustain this action it will be found, in such of them as are correctly decided, that there is so marked a distinction between them and this as makes them wholly inapplicable. In every one of them it will be found that the party held liable had some control over the negligent servants in the very work they were engaged in performing.

The judgment is affirmed. Norton and Black, JJ., dissent.

BLACK, J., DISSENTING.—For all the purposes of this case the negligence of the train men in the respect alleged in the petition is conceded, so that the only question to be considered is whether under the written contract between the two companies the defendant's train in question in passing from St. Louis to Pacific is to be regarded as defendant's train in a sense that makes it liable for the negligence of the train men. That it is liable, and liable, too, under the terms of the contract, I have no doubt.

If the defendant's train was operated by its servants, it is a circumstance of no moment that the ticket was sold by the Missouri Pacific Company, for upon that ticket the plaintiff's husband was received as a passenger, and as to him the defendant was a common carrier and liable for the negligence of its servants the same as if it had sold the ticket itself. *Todd v. Ry. Co.*, 3 Allen, 18; *Faulkers v. Ry. Co.*, 42 L. J. (N. S.) 345. Nor did it make any difference that the defendant was not the owner of the track upon and over which its cars were operated.

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Steller v. Ry. Co., 9 Cent. Law Jour. 131. It would seem to be clear enough that if this train of cars was under the control of the defendant's servants, then the defendant is liable. If under the joint control of the servants of both companies, then both companies are liable. *Nashville, etc., Ry. Co. v. Carroll*, 6 Heisk. 347; *Vary v. B., C. R. & M. R. Co.*, 42 Ia. 246.

The defendant owned and operated a long line of road which terminated at Pacific, some thirty-seven miles from St. Louis, and for the mutual benefit of itself and the Missouri Pacific Company, made the contract in question, whereby the latter undertook to transport defendant's passenger trains and freight cars back and forth between these points over the road of the Missouri Pacific Company for a stipulated percentage of the gross earnings received by the defendant from all of its passenger and freight business passing over the road of the Missouri Pacific Company, as aforesaid. It is true the manner of running the passenger trains and the control and acts of the train men while on this part of the road are to be subject to the rules and regulations of the Missouri Pacific Company, and that company is to furnish the locomotives and crews for the same at its own expense, but it is clearly provided that the defendant was to furnish, at its own expense, all train men for the *care and management of its trains*, and is required to care for the inside of its cars at St. Louis, and to pay all expenses for the use of the Union Depot at St. Louis. These train men, including the conductor, are employed by the defendant, and receive their compensation from the defendant alone. They are the servants regularly in charge of the train throughout its trip. While the Missouri Pacific Company may, and does, make the time-table and general rules, these trains are under the immediate control of the defendant's servants.

The evidence in this case shows that the conductor

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determined how long the train should stop, and gave the signal to start. That it was under his immediate control and direction can scarcely be questioned. Throughout the contract these passenger trains are spoken of as the trains of the defendant. To call these trains the trains of the Missouri Pacific Company is to disregard the plain stipulations of the contract. Some evidence was offered to the effect that the Missouri Pacific Company had the power to discharge these train men so employed by the defendant, but it does not appear that any such power was ever attempted to be exercised, and we can plainly see from the terms of the contract, that the Missouri Pacific Company had no such power. It is for the court, and not for the witnesses, to say what the legal effect of the contract is.

It is said, and there is evidence to that effect, that the defendant objected to carrying these passengers from St. Louis to Pacific and intermediate points, but we do not see what the plaintiff's husband had to do with these controversies; the broad fact remains that defendant did receive these passengers into its cars and discharge them at their destination, and that, too, on these tickets of the Missouri Pacific Company. The defendant, by its conduct, held itself out to receive such persons as passengers, certainly it did do so, and they were entitled to all the protection due to passengers. That the defendant would be liable to those passengers to whom it sold tickets from St. Louis to points beyond Pacific on its line, for negligence of these train men, cannot, we think, be fairly questioned; yet, to a passenger in the same coach who holds a ticket to Pacific, or some intermediate point, it is contended the defendant owes no duty. That this train was under the immediate control of the defendant's agents, and that they, and they alone, had the right to regulate the conduct of the passengers, and were called upon to look after and care for them as the agents and servants of the defendant, is clear enough from the terms of the contract. For these reasons I dissent from the

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opinion just filed. Whether the Missouri Pacific Company is not also liable, is a question which we need not consider, for if it is, it does not aid this defence. Norton, J., concurs.

TURNER *et al.*, Appellants, v. LANGDON.

1. **Replevin: PRIMA FACIE CASE.** Where, in an action for the possession of personal property, the plaintiff makes proof of a chattel mortgage to him, valid on its face, the possession of the property by the mortgageor, the record of the mortgage and the maturity of the debt the mortgage was given to secure, he makes out a *prima facie* case, and it is error for the court to direct a verdict for the defendant.
2. **Practice: QUESTION FOR JURY.** Where, in such action, the evidence leaves it doubtful whether or not the mortgage was recorded before the execution under which defendant claims was levied, the question should be submitted to the jury.

Appeal from Buchanan Circuit Court.—HON. W. H. SHERMAN, JUDGE.

REVERSED.

Thomas & James for appellants.

(1) The description of the property in the chattel mortgage is sufficient. *Jones v. Richardson*, 10 Metcalf (Mass.) 481; *Hardin v. Coburn*, 12 Metcalf (Mass.) 333; Jones on Chattel Mortgage, sec. 65. (2) A mortgagee of personal property, after default, is regarded as the absolute owner. 4 Kent 138; *Williams v. Rover*, 7 Mo. 556; *Robertson v. Campbell*, 8 Mo. 365; *Id.* 615. (3) A mortgagee of personal property may recover the possession thereof by replevin. *Lacy v. Gibbony*, 36 Mo. 320; *Pace v. Pierce*, 49 Mo. 393; *Williamson v. Gottschalk*, 1 Mo. App. 425; *Keck v. Fisher*, 58 Mo. 532. (4) If the

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defendant claimed the property under an execution by virtue of being deputy constable, it devolved upon him to show: first, a valid judgment, and, second, a regular execution, and this could only be done by putting in evidence the judgment and execution. 2 Greenleaf on Evidence, sec. 629; *Lee v. Lee*, 21 Mo. 534; *Ramsey v. Waters*, 1 Mo. 406; *Morrison v. Dent*, 1 Mo. 246; *Wright v. Crockett*, 7 Mo. 128. (5) If the defendant had shown a valid judgment and execution, and that he was deputy constable, still the action was properly brought against him. *Criley et al. v. Vaseh*, 52 Mo. 445-449. (6) The instruction asked by defendant should not have been given, if by giving to the testimony every reasonable intendment in plaintiffs' favor, drawing every conclusion from it, favorable to the plaintiffs, that a jury might justifiably have drawn, and conceding to it the greatest probative force to which, according to the law of evidence, it is entitled, it will warrant a verdict in their favor. *Parks v. Ross*, 11 Howard (U. S.) 373; *Pauling v. United States*, 4 Cranch 219; *Pleasants v. Fant*, 22 Wallace, 116; *Finney v. N. P. Ry. Co.*, Sup. Ct. Dakota, June 16, 1883; 16 N. W. Rep. 500; 17 Cent. Law Journal, 240; *Kelly v. Han. & St. Joe Ry. Co.*, 70 Mo. 608; Charging the Jury, by Thompson, page 38, and authorities there cited. (7) The property actually taken by the sheriff under writ in this case from defendant is shown, by the evidence of Adams, to be the property described in the petition; the defendant, in fixing the value of the property, the possession of which he claimed, fixed the value of the goods in the store on the nineteenth day of April, 1881, thereby admitting that they were the goods taken from him by the sheriff under the writ in this case

BLACK, J.—The plaintiffs, Turner, Frazer, Parry and West, partners under the firm name of Turner, Frazer & Co., and Douglass and Wiehl, partners under the firm name of R. Douglass & Co., commenced this suit in

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replevin on the thirtieth of April, 1881, to recover certain personal property. The defendant answered that he was the legal owner of the property, and prayed judgment for a return thereof. The evidence shows that Richey was in possession of the property, and on the nineteenth of April, 1881, made a mortgage on the property to plaintiff to secure two debts, one due to each of said firms. The mortgage was recorded on the twenty-second of April, 1881, at half past five o'clock, p. m. Both debts were due when this suit was commenced.

Mr. Adams testified that on the twenty-second of April he inquired at the recorder's office and found no mortgage of record. He then had the defendant, as deputy constable, to levy on the goods. He says he returned to the recorder's office on the same day, and found the mortgage recorded. There was evidence of the value of the goods. On this evidence the court directed a verdict for the defendant. The respondent has filed no abstract or brief, and hence his position with respect to this appeal is left to conjecture.

The chattel mortgage is not fraudulent on its face, and there was no sufficient evidence to direct a verdict on the ground of fraud. Proof of the possession of the property by Richey, and the recorded mortgage from him to the plaintiffs, and proof of the maturity of the debt, made a *prima facie* case for the plaintiffs. Mr. Adams, the witness, does not show, affirmatively, that the execution was levied before the mortgage was recorded. The execution was not read in evidence, nor does the record show when or by whom it was issued. The triers of fact might infer that the execution was levied before the mortgage was recorded, but this did not justify the court in assuming that to be the fact. This court has said where a "material fact is left in doubt, or there were inferences to be drawn from facts proved, the case, under proper instructions, should be submitted to the jury." *Kelly v. Ry. Co.*, 70 Mo. 604-608.

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The judgment is reversed and the cause remanded. Norton and Sherwood, JJ., dissent. The other judges concur.

SHERWOOD, J., DISSENTING.—In actions like the present one, the *onus probandi* is on the plaintiff, to establish the allegations of the petition, that at the time of the caption he had a general or special property in the goods taken, and the right of immediate and exclusive possession. 2 Greenleaf on Evidence, sec. 561; *Cross v. Hulett*, 53 Mo. 397. The issues on these points were fairly raised by the answer denying the allegations of the petition and alleging title in the defendant, and that he was also entitled to the possession of the property. And where the issue is on the plaintiff's property his right to the possession at the time of taking is also involved in the issue. 2 Greenleaf on Evidence, sec. 563, and cases cited. And a plaintiff in an action of replevin must rely upon the strength of his own title, and if he fails to show title in himself, it is wholly immaterial whether the defendant has title or not. *Johnson v. Neale*, 6 Allen 227, and cases cited.

Under issues such as are raised by the pleadings herein, it has been ruled that any evidence is admissible on the part of the defendant, going to show that the plaintiff has neither property nor the right of possession, *e. g.*, that the title was in a stranger. *Schulenberg v. Harriman*, 21 Wall. 44. How have the plaintiffs met the issues raised by the pleadings? They have shown a chattel mortgage for the goods, which secured to them the payment of the debts therein specified. But it nowhere appears that those debts were due on the day the mortgage was filed for record. On the contrary, it appears that such debts became due some time afterward. Of course, under the rulings of this court, the plaintiffs, until their debt became due, and condition of the mortgage being thus broken, were not entitled to the

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possession of the goods. *Sheble v. Curdt*, 56 Mo. 437; *Barnett v. Timberlake*, 57 Mo. 499. This being the case, the levy by the constable of the execution on the goods gave him such a special property in the goods as would suffice to defeat plaintiffs' action, unless their mortgage was registered prior to the levy of the execution. Was such registry prior to such levy? If the testimony of Adams, the witness of plaintiffs, and the only witness on this point, be taken as true, the tendency of that testimony, and its only tendency, is to show that the levy of the execution occurred prior to the levy of the mortgage. There is no escape from this conclusion. At all events, his testimony, to state the case as strongly as possible for the plaintiffs, and more strongly than the evidence warrants, leaves it in serious doubt as to which, the levy or the registry, was prior in point of time. Now, on whom did the *onus* lie to resolve this doubt; to make it clear which had priority, the levy or the mortgage? Under the authorities, that burden was on the shoulders of the plaintiffs. Have they met the requirement of the law in this particular? If they have, I have not been able to find any evidence thereof.

It does not appear in whose favor the execution in question issued, nor is it material to know. The plaintiffs, themselves, without objection from defendant, introduced testimony that an execution in the hands of the defendant was levied on the goods in dispute, and it must, therefore, be presumed that the execution was in all respects valid and based on a valid judgment. For these reasons I discover no error in the record, and am for affirming the judgment, and, therefore, dissent from the conclusion reached by the majority of the court. Norton, J., concurs with me.

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WATSON, Appellant, v. HARMON.

1. **Conversion : INADEQUATE DAMAGES : PRACTICE.** The court should set aside a verdict for the plaintiff in an action for the conversion of property when the damages assessed by the jury are manifestly inadequate, and where the trial court refuses to do so, the Supreme Court will interfere and reverse the judgment.
2. **Interest.** Interest should be allowed on the value of property wrongfully converted from the time of the conversion.

Appeal from Platte Circuit Court.—HON. G. W. DUNN,
Judge.

REVERSED.

Spencer & Hall and Doniphan & Reed for appellant.

(1) The action of the court in striking out of plaintiff's instruction the words "with interest on such sum at six per cent. per annum from the time of such conversion" was error. The law allows interest where property is converted. *Sutherland on Damages*, 174; *State, etc., v. Smith*, 31 Mo. 566; *Walker v. Borland*, 21 Mo. 289. (2) The trial court should have set aside the verdict. *Nicholson v. Couch*, 72 Mo. 209; *Faughman v. Heisey*, 43 Mo. 122; *McKay v. Underwood*, 47 Mo. 185; *Price v. Evans*, 49 Mo. 396; *Alderman v. Cox*, 74 Mo. 78.

Ramey & Brown for respondent.

The plaintiff cannot complain of the verdict. His contract with defendant was a collusive one to defraud his creditors. *Bump on Fraudulent Conveyances* (3 Ed.) 443, 444 and 456; *Hamilton v. Scull*, 25 Mo. 166.

PER CURIAM.—This is an action for conversion. The petition alleges, in substance, that plaintiff was mer-

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chandizing, and had in his possession as owner a large quantity of goods of the value of \$4,800, and notes and accounts aggregating \$5,724, making a total valuation of assets of \$11,563. That on the thirtieth day of March, 1877, the defendant forcibly entered the plaintiff's store and took and converted the said property to his use, wherefore judgment is asked for said sum of \$11,563, and interest thereon from the day of said conversion. The answer tendered the general issue. At the trial before a jury the plaintiff testified that he owned the property and put it in the name of defendant; that he was in debt about \$12,000, and that he carried on the business in the name of and put the property in defendant's name, to put it beyond the reach of his said creditors; that the goods originally belonged to defendant, and that he purchased the stock and continued to do business in defendant's name, and this by agreement with defendant, and that defendant unlawfully and wrongfully and against plaintiff's consent took the goods and property mentioned in the petition and converted them to his own use.

Defendant introduced evidence tending to show he owned the store, goods, notes and accounts and that they were worth much less, but the lowest value fixed by any witness was the sum of \$3,300.

Allen Dunlap, a witness offered by defendant, stated that he had charge of the goods, notes and accounts, and that the goods were worth only fifty cents of the invoiced price of \$4,880.18. Plaintiff on cross-examination asked him if the defendant did not realize out of the goods the full invoice price. The court refused to permit him to answer the question; and plaintiff offered to prove that defendant realized the full invoice price, but the court excluded the testimony, to which plaintiff at the time excepted.

The plaintiff asked the following instruction:

"1. The court instructs the jury on the part of the plaintiff, that if they believe, from the evidence, that on

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or about the thirtieth day of March, 1877, at De Kalb, in the county of Buchanan, Mo., the plaintiff was the owner of and in the lawful possession of the personal property mentioned in the petition, that is to say, of goods (merchandise) of the value of \$4,888.18 or any less sum, and of notes of the value of \$4,997.86, or any less sum, and of accounts of the value of \$1,756.55, or any less sum, and that at the time and place above mentioned the defendant wrongfully and unlawfully, and against plaintiff's consent, took from plaintiff and from his possession the said goods and merchandise and notes and accounts, or any part thereof, and converted the same to his own use and benefit, they will find for plaintiff, and assess his damages at such sum as they may find, from the evidence, the said property was worth at the time and place of such conversion, with interest on such sum at six per cent. per annum from the time of such conversion."

The court struck out of said instruction the words, "with interest on such sum at six per cent. per annum from the time of such conversion," and gave the balance of it.

The only material instruction given on behalf of defendant is as follows:

"That the burden of proving that the property in question, on the thirtieth day of March, 1877, was the sole property of the plaintiff, and that he was deprived of the possession thereof by the defendant and that defendant obtained such possession against the wishes and consent of the plaintiff, devolves upon the plaintiff, and unless the jury are satisfied, from the evidence, of such facts, they must find for the defendant."

The jury returned the following verdict: "We, the jury, find for the plaintiff and assess his damages at one dollar." After ineffectual motions for new trial and in arrest, the plaintiff has appealed from the judgment entered on said verdict.

I. The verdict of the jury in this case is most

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extraordinary. They found the issues for the plaintiff. The issues involved the ownership of the property in question. By the verdict the jury found the property belonged to the plaintiff. The next issue involved was, did the defendant wrongfully take and convert the same? The jury found that he did. To these established facts the law attached to the defendant trespasser the liability to answer in damages to the plaintiff for the full value of this property. The only remaining duty, therefore, devolved upon the jury by the law and their oaths, was to ascertain and return the value of the property at the time of its conversion. How were the jurors to ascertain this fact? From the evidence before them and not otherwise. The plaintiff's evidence placed the maximum value of this property at \$11,000, while the minimum valuation of defendant's witnesses was \$3,300. Yet the jury, after finding the issues for the plaintiff, assessed his damages at one dollar. It is not conceivable how the jury reached such a conclusion, as to the damages, otherwise than by a total disregard of the law and the evidence. We concede that the jury is the sole judge of the weight of evidence and the credibility of the witnesses, and with the exercise of their judgment, within the rightful bounds of their province, the judge ought not to interfere. But their latitude, like that of the judge, is not an arbitrary or oppressive discretion, but it is, as it should be, circumscribed and restrained by law, reason and justice. To sanction such a verdict would be to recognize the right of a jury to confiscate private property. It is the solemn duty of a court to set aside such a verdict. "Otherwise, the power of courts over verdicts is a mere delusion and a mockery. * * *

To sanction the verdict is to consecrate injustice, if it has been perpetrated, and may be the ruin of the injured party. To set it aside leaves the successful party still a fair opportunity to obtain another verdict if justice really be on his side." 3 Graham & Waterman on New Trials, 1207.

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In actions for personal wrongs, such as personal injuries, slander, malicious prosecution, etc., it is rare that the courts will interfere with the verdicts of juries on account of the smallness of the damages awarded. 3 *Graham & Waterman on New Trials*, 1165; *Gregory v. Chambers*, 73 Mo. 294. But in cases of breach of contracts and injury to property, which have fixed standards of value, or at least capable of estimation by direct proof, if there appears glaring deficiency in the verdict, justice demands a reversion. *Taunton Manf. Co. v. Smith*, 9 Pick. 11; *Bagby v. Lewis*, 2 Monroe 76; *Chambers v. Collier*, 4 Geo. 193.

Nicholson v. Couch, 72 Mo. 209, was an action for conversion. The judgment was reversed because the damages assessed were excessive. Norton, J., observed: "The amount of the verdict for the plaintiff was, however, excessive, according to the highest estimates of the witnesses in regard to value, and the judgment must, therefore, be reversed." If reversible because the verdict is in excess of the "highest estimate of the witnesses in regard to value," logically and equitably the same result must follow where the verdict is so far below, as in this case, the lowest estimate of any of the witnesses. *Fury v. Merriman*, 45 Mo. 500.

II. The court, likewise, erred in refusing to instruct the jury that if they found for plaintiff to allow him six per cent. interest on the value of the property taken from the day of conversion. *Sutherland on Dam.* 174; *Walker v. Borland*, 21 Mo. 289; *State ex rel. v. Smith*, 31 Mo. 566; *Spencer v. Vance*, 57 Mo. 427; section 2126, R. S.

The judgment of the circuit court is reversed and the cause remanded for further proceeding in conformity with this opinion.

The Mo. Pac. Ry. Co. v. Carter.

THE MISSOURI PACIFIC RAILWAY COMPANY, *Appellant*,
v. CARTER *et al.*

1. **Railroads: CONDEMNATION OF LAND.** Proceedings to condemn land for railroad purposes must be brought in the county where the land lies.
2. ———: ———: **PARTIES.** One who is neither a resident of the county nor of the judicial circuit, cannot be joined in the proceeding. Such misjoinder, however, could only cause a dismissal as to him, and would not authorize the court to dismiss the whole proceeding.
3. ———: ———: **MINORS.** The land of minors cannot be condemned for railroad purposes without making their guardians defendants in the condemnation proceeding. In case they have no regular guardian, guardians *ad litem* should be appointed.
4. ———: **COMMISSIONERS' REPORT.** The report of the commissioners is insufficient if it fail to contain a specific description of the property for which damages are assessed.

Appeal from Cole Circuit Court.—HON. E. L. EDWARDS,
Judge.

REVERSED.

Thos. J. Portis and Smith & Krauthoff for appellant.

(1) This proceeding was instituted under the provisions of article six, chapter twenty-one, Revised Statutes, pages 160, 161, 162, and 163. In proceedings to condemn land for railroad purposes an allegation in the petition that the "parties could not agree upon the proper compensation to be paid for land proposed to be taken" is a sufficient averment of the fact of disagreement to put the adverse party upon the defence to the merits. The petition in this case meets exactly this requirement. *H. & St. Jo. Ry. v. Muder*, 49 Mo. 165; *K. C., St. Jo. & C. B. Ry. v. Campbell*, 62 Mo. 585. (2) The

circuit court erred in dismissing the proceeding as to all of the defendants, even if the defendant, Theodore Heinen, did not reside in Cole county, nor in the first judicial circuit. If the defendant, Heinen, who resided in Osage county and not within the circuit where the land sought to be condemned was situate, was misjoined with the other defendants, who resided in the circuit where the land was situated, the court in any view of the case, should have only dismissed the proceedings as to said Heinen. (3) The question that defendant had not charter authority to operate a road in the locality in question could not be raised in this proceeding. 38 New Jer. Law, 17. (4) There is no appearance by any one on behalf of the minor defendants, and so the allegation of a failure to make their guardian a party defendant is immaterial—Schoenen cannot raise it. If the minors are not made parties *their* interest does not pass, but it does affect the other parties. (5) Heinen's objections are not tenable. Under section 892 "the owners of all such parcels as lie within the county or circuit shall be made parties." This is a proceeding *in rem* and the *situs* of the property determines the jurisdiction, not the residence of the parties.

Edwards & Davison for respondents.

(1) The circuit judge had no jurisdiction to appoint commissioners. *Kansas City, etc., Ry. v. Campbell*, 62 Mo. 585; *Quincy, etc., Ry. v. Kellogg*, 54 Mo. 334. (2) It was not for the circuit court to single out one party and confirm the report as to him and reject it as to the others. *Miss., etc., v. Ring*, 58 Mo. 491. (3) The statute authorizing the condemnation proceeding, being in derogation of the common law, should be liberally construed in favor of those whose rights are affected. 58 Mo. 491-494, *supra*. (4) The petition was defective in that it showed on its face that plaintiff was seeking to affect the land of minors and their guardians were not made parties, and,

also, in that it in like manner showed that the parties defendant did not reside in the same county, nor in the same judicial circuit.

BLACK, J.—This proceeding was commenced in the Cole circuit court to condemn the property of the defendants for a sidetrack. On the return of service of notice, three commissioners were appointed to assess damages, who made their reports. The defendant, Heinen, filed separate exceptions to the report, appearing for no other purpose. The other defendants, except Carter, as to whom the proceedings were dismissed, also filed exceptions. The exceptions were sustained, and the court being of the opinion that the petition did not state facts sufficient to authorize the appointment of commissioners, dismissed the proceedings.

1. The land lies in Cole county, and the proceedings could not be carried on in any other county, but inasmuch as Heinen did not reside in that county, or in that judicial circuit, under the authority of *Ry. Co. v. Kellogg et al.*, 54 Mo. 334, he should not have been joined in the same petition. But that did not justify the court in dismissing the whole cause. The misjoinder could have no further effect than to call for a dismissal as to him.

2. Three of the defendants were minors. If these defendants had guardians, then such guardians should have been made defendants according to the plain terms of section 892, Revised Statutes. If they were not under guardianship, then, when served with process, guardians for the purpose of the suit, should have been appointed. While the act with respect to the condemnation of lands, makes no special provision for the appointment of guardians for the purpose of the suit, still the practice act does, and it would be against all reason to permit these proceedings to go on to a condemnation of the minors' property without a guardian to look to their interest.

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3. Section 894, Revised Statutes, requires that the report of the commissioners shall contain a specific description of the property for which such damages are assessed. The object of this requirement is obvious. The report is to be recorded, and becomes a muniment of title, and it ought to be made with care. The report, even as amended, is in this respect deficient. It must give a description of the property condemned.

4. The evidence shows quite satisfactorily that the company and Schoenen could not and did not come to any agreement with respect to the compensation to be paid, and that an effort so to do was duly made. No such question as this is made by the exceptions with regard to any of the other defendants, and the petition is sufficient in that respect. It clearly asserts that no agreement could be made as to compensation, though an effort so to do had been made. This statement must be taken as true until controverted. *H. & St. Jo. Ry. Co. v. Muder*, 49 Mo. 165.

It follows from what has been said that the report of the commissioners was properly set aside, but the court erred in dismissing the entire proceedings, because of which the final judgment in that respect is reversed and the cause remanded for further disposition in accordance herewith. The other judges concur.

THOMPSON V. HENRY, *Appellant*.

Equity: SALE OF LAND: SPECIFIC PERFORMANCE. A court of equity will decree the specific performance of a contract for the sale of land against one who accepts a deed with the knowledge, on his part, of the right of another to enforce such specific performance against the grantor.

Thompson v. Henry.

Appeal from Bates Circuit Court.—HON. JAS. B. GANTT,
JUDGE.

REVERSED.

Galloway & Henry for appellant.

(1) The defendant had a good equitable title to the land in question. (2) And plaintiff having purchased with notice of the facts, the court should, as against him, have decreed specific performance of the contract. *Hays v. Hall*, 4 Porter 374; *Deniston v. Hoagland*, 67 Ill. 268; *De Wolf v. Pratt*, 42 Ill. 211; *Patterson v. Copeland*, 52 How. Pr. 460.

Edwards & Davison and *J. K. Brugler* for respondent.

(1) There is nothing in defendant's case to warrant the court in finding for him. R. S., sec. 2513; *Gibbs v. Sullens*, 48 Mo. 237. (2) The court having heard the proof on defendant's answer and having found against him, this court will not review the finding. *Chapman v. McIlwraith*, 77 Mo. 38; *Chouteau v. Allen*, 70 Mo. 336; (3) There was no proof of good faith on part of appellant, no valuable improvements, nothing in fact done by him which calls for the interference of a court of equity. *Ells v. R. R.*, 51 Mo. 200; Story's Eq. Pl., sec. 762; *Widdicombe v. Mercer*, 72 Mo. 588:

HENRY, C. J.—This is an action of ejectment by which plaintiff seeks to recover possession of the southeast quarter of the southeast quarter of section two, township forty, range thirty, in Bates county. The petition is in the usual form, and the answer a general denial, containing, also, the following equitable defence, viz.: "That on or about the — day of November, 1879, he entered into an agreement in writing with Howard A. Parish, the plaintiff's vendor, by

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which it was agreed between said Parish and defendant that said defendant should take possession of the land described in the petition, and fence and occupy the same until said land should rise in value, and until said Parish should see fit to sell the same. In consideration of the fencing of said land, he would give the defendant the preference and refusal of purchasing said land at a price to be fixed by said Parish. That said defendant, relying on the agreement of said Parish, and believing that the same would be carried out in good faith, entered into possession of said land and fenced the same and has ever since held and occupied the same under and by said agreement. That, afterwards, on the twenty-fifth of May, 1881, and before making a deed to the plaintiff, the said Parish named to the defendant the price of said land and offered, in writing, to sell the same to defendant, at the price of six hundred dollars, two hundred to be paid on execution of a deed by said Parish to defendant, and the balance in equal installments due in one and two years, at eight per cent. interest. Upon receipt of which offer to sell said land on the terms aforesaid, defendant immediately accepted, in writing, the offer on the terms named, and notified said Parish of his acceptance, prior to the time said land was conveyed to plaintiff by said Parish. That plaintiff knew each and every one of these facts as aforesaid, but combining and confederating with said Parish by and through his agents, E. P. Henry and R. G. Hartwell, procured a deed to be made from said Parish to plaintiff, purporting to convey said land to him, plaintiff. That said deed is the only claim or color of title plaintiff has to said land. That plaintiff before, and at the time of his purchase of said land from Parish, had full notice of all the rights and equities of defendant, and of all the facts aforesaid, and knowing the same took the same for the purpose of defeating defendant in obtaining his just rights in the premises. Defendant says that he has at all times been ready and willing to comply with the terms of his agreement with

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said Parish in relation to said land, and to pay the said sum of six hundred dollars, and to secure the payment of the balance in equal installments with interest as aforesaid, and now brings said money and security here into court and tenders the same subject to the order of the court, etc., and prays that said plaintiff be compelled by order of the court to convey said land to defendant, on the terms and conditions of the contract between defendant and Parish," etc.

The replication denied all the allegations of the answer. On a trial there was a judgment for plaintiff from which defendant has appealed.

Howard Parish conveyed the land to plaintiff by deed, dated the twenty-first of June, 1881. One E. P. Henry and Hartwell were the agents who negotiated for plaintiff with Parish for the land, and Parish testified that on the second day of June, 1871, he wrote to E. P. Henry telling him that A. Henry was entitled to the refusal of the land. He also testified that: "About two years before the time the deed to Thompson was made, defendant took possession with the understanding between me and the defendant, that the defendant would fence the land and have the use of it till it was to be sold, and if defendant did not buy it, that he, defendant, might move his fence from it, but defendant was to have the preference in buying it at the price to be fixed by me. E. P. Henry was informed of this agreement before the deed was made to Thompson. There was no correspondence between me and Thompson; it was done with E. P. Henry; I made the deed to Thompson because I was offered fifty dollars more than I had priced the land at; I received defendant's letter in answer to exhibit 'B,' in which defendant offered to pay the six hundred dollars in cash, and this was before I made the deed to plaintiff."

November 25, 1879, Parish wrote to defendant as follows:

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"P. O., HOUSTON, Harris Co., Texas, Nov. 25, 1879.

"*A. Henry, Esq.:*

DEAR SIR: You can go ahead and fence the land in accordance with your last letter.

"Very Respectfully Yours,

"H. A. PARISH."

In pursuance of his contract with Parish, A. Henry took possession of the land, and fenced it, and was in possession when the plaintiff took his conveyance. Some time prior to June 2, 1881, E. P. Henry and Hartwell mailed to Parish a deed for the land to plaintiff for execution, and, on that day Parish wrote them as follows:

"HOUSTON, TEXAS, June 2, 1881.

"*Henry & Hartwell, Butler, Mo.*

"DEAR SIR: Your favor with enclosed deed to hand. I am perplexed in regard to the case as it now stands. When I gave you the news that I would sell the land, I forgot a former promise that I made to Mr. A. Henry, viz.: the refusal of said land; I did not have the least idea he would be in the field from the fact (he always wanted it) that he would never make an offer of more than half the value, but he has heard recently that other parties were after it, and on my arrival at Houston yesterday—saying he would take the place one-third down and the balance in one and two years—I prefer your offer, as it is cash, but have no doubt he will give cash if desired. I will write to him to-day and inform him that I will accept your offer unless he pays the cash, which he no doubt will do. What do you think about it? Please let me hear from you and oblige,

"Yours very respectfully,

"HOWARD A. PARISH."

It is clear from this testimony that the agreement between Henry and Parish was made as alleged in the answer, and whether plaintiff was aware of it or not, before he received his deed, his agents were, and through them he made the purchase. The contract between Henry and Parish was one Henry could have enforced

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against Parish. He had taken possession of the land and fenced it, under the contract, which was so clearly proved in all its terms that a court of equity would have enforced it against Parish, and plaintiff, with notice, actual or constructive, of the existence of that agreement, had no right in equity, to purchase and hold the land, against Henry. Upon what theory the court found against Henry, and rendered a judgment for plaintiff does not appear. The judgment is reversed and the cause remanded. All concur.

THE STATE *ex rel.* RICE *et al.* v. CAYCE *et al.*

1. **Sheriff, Official Acts of: BOND.** A sheriff, who by consent of the parties in interest, receives payment of the purchase money of land sold under a judgment in partition, before the time the same is due and payable under the order of sale, will be deemed to have received it in his official capacity, and the sureties on his bond are liable for his default in paying it over to the persons entitled to it.
2. **Guardian of Minor, Authority of.** The consent of a guardian of a minor that the sheriff shall so receive the purchase money before the expiration of the time of credit named in the order of sale is binding on the ward.
3. **Penalty: SHERIFF: MONEY COLLECTED ON EXECUTION: STATUTE.** The five per cent. penalty allowed against a sheriff and his sureties under Revised Statutes, sections 2403 and 3378, on money collected on execution, which the former has failed to pay over to the persons entitled to the same, does not begin to run until a demand has been made.
4. **The institution of a suit against the sheriff is a demand.**

Appeal from St. Francois Circuit Court.—HON. J. D. Fox, Judge.

REVERSED.

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Smith & Krauthoff, with *William Carter*, for M. P. Cayce *et al.*, on their appeal.

(1) If Faherty had no authority to empower McMullin to receive the money, the latter's act in receiving it was unauthorized. *Blair v. Ins. Co.*, 10 Mo. 566; *Brandt on Sur. and Guar.*, secs. 483, 484; *State v. McDonough*, 9 Mo. App. 63. (2) Faherty, as guardian, had the power to employ agents to transact the business of his ward, to execute all instruments necessary to the fulfillment of his trust, being responsible to his ward for the exercise of due diligence and prudence. *Schouler's Dom. Rel.*, secs. 318, 346, 381; *Roger's Appeal*, 11 Pa. St. 36; *Wynne v. Benbury*, 4 Jones Eq. 395; *Glover v. Glover*, 1 McMull. 153. In the case at bar, he assumed the authority and all the parties to the arrangement acted upon it. If he did not, in fact, have the authority he claimed, these defendants, as we have already shown, cannot for that reason be made liable for the consequences of his act, and no principle of law or consideration of an equitable nature is violated in placing the loss upon him who set in motion the arrangement which caused it, instead of upon these defendants, who are "favorites of the law." But there is another ground upon which the ruling of the court now in question must be held erroneous. Although the plaintiffs were tenants in common in the lands sold, their interest in the note given for the residue of the purchase money was joint. *Penn v. Butler*, 4 Dall. (Pa.) 324; *Bowes v. Seeger*, 8 Watts and S. 222; *Saltmarsh v. Rowe*, 10 Mo. 39, 48. And being so, the act of any one of the parties plaintiff, which operated as a release of the liability of these defendants, was a release of that liability as to all of the plaintiffs. Any one of them injuriously affected by such release must look to his co-plaintiff, but cannot compel these defendants to make good the loss. *Pierson v. Hooker*, 3 Johns. 68, 70; *Erwin v. Rutherford*, 1 Yerg.

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169, 173, 174, *et seq.*; *Austin v. Hall*, 13 Johns. 286; *People v. Keyser*, 28 N. Y. 226, 228; *Clark v. Cable*, 21 Mo. 223, 225. No complaint is made of the judgment against the defendants for the ten per cent. of the purchase money received by McMullin, *as sheriff*, but the judgment in favor of Faherty, guardian and curator, for the interest of his ward, is erroneous and must be reversed.

Smith & Krauthoff, with *William Carter*, for Cayce *et al.*, respondents.

(1) Sureties on a sheriff's bond are not liable for any but official acts of their principal, and if, by the acts of the parties in interest, by agreement with other parties, directions to the sheriff, or otherwise, the execution of the order of sale was meddled or interfered with, or the duties of the sheriff in executing it, changed, the result cannot be visited upon these sureties. *Nolley v. Callaway County*, 11 Mo. 447; *St. Louis v. Sickles*, 52 Mo. 122; *Prior v. Kiso*, 81 Mo. 281; Murfree on Sheriffs, secs. 45, 82, 942; *People v. Pennock*, 60 N. Y. 421; *Ry. v. Higgins*, 58 Ill. 128; *Carey v. State*, 34 Ind. 105. (2) The act of the sheriff in receiving the money was not an official act. *Hamilton v. Ward*, 4 Texas, 356; *Thomas v. Browder*, 33 Tex. 783; *Rudd v. Johnson*, 5 Litt. (Ky.) 20; *Turner v. Collier*, 4 Heisk. 89; *Craig v. Gravis*, 4 J. J. Marsh. 603; *Alcorn v. State*, 57 Miss. 273.

John H. Nicholson for Matilda Rice *et al.*, appellants.

(1) Whatever money is received by the sheriff during his term is received by color of his office, and his neglect or failure to pay it over constitutes a breach of his bond, for which the sureties are liable. *State, etc., v. McCormick*, 50 Mo. 568. (2) Even if it be true that the plaintiffs consented to the sheriff's collecting and paying

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the money over to them, less eight per cent., before the end of the year, yet this does not amount to consent on the part of the plaintiffs to the use or conversion of the money by the sheriff. (3) Neither the minor nor the married women, nor any one else for them could consent to the premature collection of the balance of the purchase money by the sheriff in violation of the terms of the order of sale, so as to estop such minor and married women from instituting suit on the sheriff's bond for the recovery of the money wrongfully converted by him. An estoppel *in pais* is not applicable to minors and married women. *Lowell v. Daniels*, 2 Gray 161, 168; *Bemis v. Call*, 10 Allen 512, 517; *Merriam v. Boston, etc., Ry. Co.*, 117 Mass. 241, 244; *Rannells v. Gerner*, 80 Mo. 474. (4) The institution of this suit amounted in law to a demand of the money due plaintiffs, and they were consequently entitled to a penalty of five per centum per month on the amount due them, computed from the time of commencing suit. 1 R. S., 1879, secs. 3378, 2403. Hence the court erred in refusing instruction number six, asked by plaintiffs, and in giving instruction number four, asked by defendants. (5) As shown by instruction number seven, given by the court at the instance of plaintiffs, the court found that co-plaintiff, Matilda Rice, did not sign the letter written to sheriff McMullin, hence the court erred in rendering judgment against said co-plaintiff. (6) Where the conversion of money is alleged in the petition, it is unnecessary to allege demand of payment and refusal. And they need not be proved where failure of demand is not set up in the answer. *Battel v. Crawford*, 59 Mo. 215. (7) The sheriff had power, as sheriff, to receive the purchase money and make deed to the purchaser, but doing so before the time mentioned in the order of sale, amounted to nothing more than a mere irregularity. The deed was made at the same time he received the purchase money; if he did not receive the purchase money as sheriff, he did not

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make the deed as sheriff; both were, or were not, official acts.

John H. Nicholson for Faherty, guardian of Lewis Delassus, respondent.

The sheriff had the authority to receive the money arising from the partition sale, but received it before the same by the terms of the note became due. He so received it in his official capacity, *virtute officii*. The note was made payable to the sheriff, as such, and not to him in his individual capacity. He could collect the note and receive payment for it only in his official capacity. All the cases make a distinction between those in which the officer, as such, has no power or jurisdiction at all to do the act, and the cases where he has the power to do the act itself, but does it in an improper or unlawful manner, or at an improper or unlawful time. In the latter case, the sureties are liable, and this case falls within the rule making them liable.

HENRY, C. J.—This is an action against Cayce *et al.*, as sureties on the official bond of W. S. McMullin, as sheriff of St. Francois county, to recover \$1,210, with interest and statutory damages. The money was received by said sheriff on a sale of lands in a partition proceeding, the order of sale requiring ten per cent. of the purchase money to be paid in cash, and the residue in twelve months. The sale was made the nineteenth of May, 1880, and ten days thereafter, Patterson, the purchaser, paid for the land the \$1,210 bid by him, and received a deed from the sheriff. The receipt of the money at that time, was by agreement between the parties entitled to it, and the sheriff and Patterson, and it is contended by the defendants, and so the court declared, that the sheriff did not receive the money in his official capacity, but as the agent of the plaintiffs, except as to Lewis Delassus, a minor. In this we think the court erred.

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The sheriff had no authority to receive the money, except as sheriff. The agreement between him and the parties was not his authority for receiving the money, but only constituted an excuse for not strictly complying with the terms of the order of sale. Nor do we agree with the court that Lewis Delassus was not bound, equally with the others, by the agreement made on his behalf by his duly appointed guardian. Section 3346, Revised Statutes, provides that: "The guardians and the curators of the estates of minors and persons of unsound mind, appointed according to law, are hereby authorized, in behalf of their respective wards, to do and perform any matter or thing respecting the division of any lands, tenements, or hereditaments, as herein directed, which shall be binding on such ward and deemed as valid to every purpose, as if the same had been done by such ward after his disabilities are removed."

The institution of this suit was a demand of the money, and plaintiffs were entitled to damages, at the rate of five per cent. per month from that time, in addition to interest. Sections 2403 and 3378, Revised Statutes. Section 2403 provides, that if an officer collect money under an execution and does not pay the same according to law, he shall be liable to the person entitled thereto, with interest, and damages at five per cent. per month from the date of such demand, to be recovered by civil action, or by motion against the officer and his sureties, in the court before which such suit is returnable. Section 3378 provides that "the sheriff and his sureties shall be responsible on his official bond for his acts, in all cases under this chapter, and for the notes, bonds or money collected or received by him, and he may be compelled to account for and pay over the same, in the same manner as in cases of money collected on execution."

This latter section is found in the chapter relating to *partition*. Until demand, the five per cent. per month penalty or damages does not begin to run, but the institution of a suit is a demand, and the sureties, if they

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see proper, can then pay the money and escape the penalty.

The judgment is reversed and the cause remanded. All concur.

DUDLEY, *Appellant*, v. DAVENPORT, *Administrator*.

DOWER: SETTLEMENT IN BAR OF: STATUTE. Under Revised Statutes, section 2202, concerning dower, a settlement to be in bar of dower must be expressed on its face to be in discharge of the same.

Appeal from Cass Circuit Court.—HON. N. M. GIVAN, Judge.

REVERSED.

John F. Lawder for appellant.

(1) The household furniture and provisions for one year's support, or a reasonable allowance in lieu thereof, allowed the widow by the statute (R. S., sections 105 and 106), is her absolute property. *Bryant v. McCune*, 49 Mo. 546. (2) The right of the widow to four hundred dollars' worth of personal property is absolute; vests immediately on the death of her husband and is a part of her dower. *Hastings v. Myers*, 31 Mo. 519; *McFarland v. Baze's Adm'r*, 24 Mo. 156; *Cummings v. Cummings*, 51 Mo. 261, and cases there cited. (3) A settlement, whether ante-nuptial or post-nuptial, to be a bar to dower, must be expressed on its face to be in discharge of dower. *Perry v. Perryman*, 19 Mo. 469, and cases there cited.

Jas. Armstrong for respondent.

NORTON, J.—Doctor Barnett Dudley died seized of

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no real estate, but of personal property worth about \$1200. His widow, Melvina Dudley, the appellant herein, applied within the time limited by law for her dower in said personal property, and for a reasonable allowance for one year's support. Her application was refused by the probate court, from which decision of the probate court the said widow appealed to the circuit court of Cass county, and her application being there also refused she appealed to this court.

The record shows that to defeat plaintiff's claim, defendant offered evidence tending to show that a short time before the death of her husband, he sold an eighty acre tract of land for the price of \$1200, and that plaintiff refused to relinquish her dower therein unless she received three hundred and twenty-five dollars, that upon receipt of this amount she signed and acknowledged the deed. A deed from said Dudley to plaintiff, conveying to her about thirty acres of land, was also put in evidence, and parol evidence was received showing that she sold this land for three hundred dollars, and tending to show that she admitted that the conveyance was made to her for all claim to dower in her husband's estate. All this evidence was received over the objection of plaintiff. We are of the opinion that under the ruling of this court in the case of *Perry v. Perryman*, 19 Mo. 469, where it was held that under the thirteenth section of the act concerning dower (Rev. Code, 1845, which section corresponds with section 2202, Revised Statutes), a settlement, whether ante-nuptial or post-nuptial, to be a bar to dower, must be expressed on its face to be in discharge of dower, and that the plaintiff's objection to the evidence was well taken, and that the court erred in overruling it, and in receiving the evidence, there being nothing on the face of the deed showing that the land was conveyed in discharge of dower, and which omission could not be supplied by parol.

Under the plain reading of sections 106, 107, 108, and 109, Revised Statutes, and under the construction

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put upon them in the cases of *Cummings v. Cummings*, 51 Mo. 261, and *Bryant v. McCune*, 49 Mo. 546, the plaintiff was entitled to recover, and the orders asked for should have been made, holding her to account for the personal property, viz.: two mares, a colt, and wagon, which the record before us shows she took at the appraised value.

Judgment reversed and cause remanded. All concur.

MOORE *et al.* v. DAVIS *et al.*, Appellants.

Insane Person : DEED OF GUARDIAN, APPROVAL OF BY COURT. The approval of a sale of land of an insane person made by his guardian, under an order of the court, need not necessarily appear by formal entry of record. It is sufficient if the approval appear from the clerk's minutes.

Appeal from Cape Girardeau Circuit Court.—HON. JOHN D. FOSTER, Judge.

REVERSED.

Wilson Cramer for appellants.

(1) There is nothing to show, or tending to show, any fraud in obtaining the order of sale or in any of the proceedings relating to the sale of the land, nor is there a pretense that Edwards, the purchaser, was guilty or cognizant of any fraud in the matter. (2) The judgment of the county court in the matter of selling the estate is conclusive. G. S., 1865, 234. And the proceedings show a strict compliance with the statute. (3) The minute book of the probate court, offered in evidence, was required by law to be kept and was competent to show the approval of sale, which also appeared by in-

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dorsement on the report itself. (4) Even conceding the sale made by the guardian to be of no effect, and that the title did not pass, yet the evidence shows that the purchaser paid his bid, two thousand dollars and interest, and that the guardian received and used the money for the benefit of his ward and family. These facts constitute a good defence in equity. *Henry v. McKerlie*, 78 Mo. 416.

R. B. Oliver for respondent.

(1) The sale made by the guardian was absolutely void, because of disregard of the statutory requirements relating to such sales. There was no such notice and description of the property to be sold as is contemplated by the statute. G. S., 1865, p. 236, sec. 24. (2) The report of the sale as made by the guardian was not approved by the county court, and there was no divestiture of title. The county court was a court of record and its acts can be known only by its record proper. *English v. Smock*, 34 Ind. 115; *Adams v. Tiernan*, 5 Dana 394; *Frees v. Ford*, 6 N. Y. 176; *Straus v. Drennon*, 41 Mo. 589; *Henry v. McKerlie*, 78 Mo. 416; *Mealin v. Platte Co.*, 8 Mo. 235. (3) The charge of fraud made in the replication is borne out by the evidence. *Turner v. Turner*, 44 Mo. 535; *Armstrong v. Winfrey*, 61 Mo. 354; *Kenrick v. Cole*, 61 Mo. 570. (4) The cause was tried by the court without a jury, and without any declarations of law and the finding of the trial court should not be disturbed. *Snyder v. Burnham*, 77 Mo. 52; *Chapman v. McIlrath*, 77 Mo. 38; *Hodges v. Black*, 76 Mo. 537.

PER CURIAM.—This was a suit in the nature of an action of ejectment to recover the possession of certain land, and the petition is in the ordinary form. The defendants, for answer, denied the allegations of the petition, and as a further defence, set up an equitable claim to the title of said land, in which it is alleged that Lucy Moore is the

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only heir of Thomas Walker, deceased, who, at one time, owned the real estate sued for, having purchased from Benedict Knott; that afterwards said Walker became of unsound mind, and Charles Welling was appointed his guardian, and who presented to the county court a petition in writing for the sale of Walker's real estate to pay debts and to maintain his ward and the ward's daughter; that thereupon an order of sale was entered; that the guardian had said real estate appraised, advertised, and sold it to James F. Edwards for \$2,000. That at the term of the county court succeeding that at which the sale was made, the guardian made a report thereof, which was marked and endorsed on its back, approved by the clerk; that such approval was entered upon the minutes of the court, but, by mistake and oversight, the clerk failed to make a formal entry of approval on the record proper; that the purchaser, Edwards, took possession and made lasting and valuable improvements of the value of \$2,500, and afterwards sold the land to John F. Strong for \$2,500, who afterwards sold to Greer W. Davis for \$2,500; that Davis died and willed it to his widow, Elizabeth Davis, who conveyed it to Frank A. Davis for \$2,300, who re-conveyed to Elizabeth Davis. Defendants pray judgment, and pray the court to direct the probate court to enter an order of approval of sale *nunc pro tunc*, and pray that if the deed be held void, that an account be taken of improvements made, etc., and that the same and the purchase price be decreed a lien on the premises, etc., and then a prayer for further relief.

The reply denied all new matter not directly admitted; charged that the order of sale was obtained by fraud; denied the approval of the sale by the county court, and prayed judgment as in their petition.

After the close of plaintiff's evidence, which was a deed from Knott to Thomas H. Walker, and evidence of value of improvements and rental value, the defendants offered from the records, the guardian, Welling's, petition for sale of his ward's real estate, duly verified by his

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affidavit ; then the order of sale ; then the renewal of the order of sale ; then a copy of his advertisement of sale ; the affidavit of the appraisers ; their appraisement ; then the report of sale, with the guardian's affidavit ; then the indorsement on the back of the report in these words : " Report of sale of Charles Welling, Guardian of Thomas H. Walker, insane person. Four hundred and sixty-eight and nine. Filed and approved September 3, 1867. Wm. Flentage, clerk, per R. H. Querry."

Defendants then read in evidence the following entry in the minute book of the clerk :

"468 and 69. { Charles Welling, guardian of
Thomas Walker. Report of
sale of real estate ordered,
approved."

Then the following from the records :

"GUARDIANSHIP, THOMAS H. WALKER. REPORT OF SALE :

"Now comes Charles Welling, guardian of the person and estate of Thomas H. Walker, an insane person, and presents his report of sale of real estate, sold to pay debts, and for the support of said ward and daughter, which report is in words and figures following, to-wit :"
(Then follows report in full).

Then annual settlement of the guardian, showing that he was charged with the purchase money received from Jas. F. Edwards ; and then the guardian, Chas. Welling, was sworn, whose evidence tended to show that he had, as such guardian, used part of it for the maintenance of his ward, Thos. H. Walker, and daughter, and paid over the balance in his hands to his successor, Moore. Then a deed from Welling, as guardian, to Edwards ; from Edwards to Strong ; from Strong to Greer W. Davis ; the will of Davis devising the land to Elizabeth Davis ; from her to Frank A. Davis, and from Frank A. back to Elizabeth.

There was other evidence in the case on the part of plaintiffs, as well as defendants, but, as we conceive, none

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important concerning the material questions in the case presented for our consideration. The circuit court rendered judgment for the plaintiffs, and from which the defendants bring the case here by appeal.

The question lying at the foundation of this case is the equitable title claimed by the defendants. Do the facts show that the defendants have the legal title? If the conveyances under which defendants' claim title are good and valid deeds, then they have the legal title, and must prevail in the action of ejectment. If they have not the legal title, then do they set up and have they established by evidence their equitable claim to relief? The whole question, as to the legal title of the defendants, turns upon the validity of the deed from the guardian, Welling, to Jas. F. Edwards, and if that is held in their favor it will be useless to go further. An examination of the guardian's deed to Edwards will show it to be formal on its face in every particular; and so far as we have been able to find in the record, no objection was made by the plaintiff to its being read in evidence. If this be true, then it was unnecessary for the defendants to offer the record entries of the county court in aid of its provisions; but that was done in addition to reading or offering all the conveyances from Edwards to the defendants.

But in aid of the deed, and especially to show that the guardian's sale was approved by the county court, the defendants read in evidence all the records set out in the statement, including the whole proceeding from the appointment of Welling as guardian, his application or petition for sale of the land; the order of sale; the advertisement; the sale; the report of sale which is recorded at length in the records of the county court; the indorsement on the back of the report by the clerk, and the entry of approval on the minutes. You will rarely find a proceeding of the kind more formal from its beginning to the end and unquestionably proves that the report was approved by the court. There was ample evidence

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here on which to base an application to the probate court for an entry *nunc pro tunc*. *Atkinson v. A., T. & S. F. Ry.*, 81 Mo. 50. The case here is much stronger than that of *Jones v. Manly*, 58 Mo. 559, in which Sherwood, J., says, "regularly, the approval by the court of the report of sale by the administrator ought, perhaps, to be entered of record. But it does not necessarily follow that if no formal entry is found reciting this, that, therefore, the sale is void, and liable to overthrow in a collateral proceeding." In *Henry v. McKerlie*, 78 Mo. 416, it is held by Martin, C., that, "the approval of the sale by the court need not necessarily appear by formal entry of an order. It is sufficient if the approval can be gathered from the whole record. The equity for a title is then complete."

Applying these principles to the facts of the case at bar, it is evident that the defendants have the better title and the court erred in finding for the plaintiffs. The judgment is reversed and the case remanded.

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Constitution : ST. LOUIS COURT OF APPEALS : TRANSFER OF CAUSES TO SUPREME COURT. The general assembly was authorized, by virtue of the amendment to the constitution of 1884, concerning the judicial department, to transfer to the Supreme Court from the St. Louis court of appeals all causes pending in the latter court on January 1, 1885, and which were subject to final review in the Supreme Court.

Mandamus.

WRIT DENIED.

R. A. Bakewell for petitioner.

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A. R. Taylor for respondent.

BLACK, J.—By article six, section twelve, of the constitution of 1875, the St. Louis court of appeals had conferred upon it appellate jurisdiction co-extensive with a defined and limited territory. This court was given appellate jurisdiction from that court in certain classes of cases, among which are “in all cases where the amount in dispute, exclusive of costs, exceeds the sum of two thousand five hundred dollars.” Thus the matter stood until the adoption of the constitutional amendment in November, 1884, by which the jurisdiction of that court was extended territorially to a number of additional counties. There was also thereby created the Kansas city court of appeals with jurisdiction over the remainder of the counties in the state. This constitutional amendment provided for the transfer of causes pending in the Supreme Court to the Kansas City court of appeals. The third section also gave to the general assembly power to create one additional court of appeals with a new district to be carved out of the others and power “to change the limits of the appellate districts * * * to increase or diminish the pecuniary limits of the jurisdiction of the courts of appeals; to provide for the transfer of causes from one court of appeals to another court of appeals; to provide for the transfer of cases from a court of appeals to the Supreme Court.” As to those cases pending in the St. Louis court of appeals at the time of the adoption of the amendment that court, in the absence of any further legislation, would proceed to a determination and this court would entertain appellate jurisdiction therefrom as before.

The power of the general assembly to transfer causes from one court to another may be conceded to be confined to such actions as the courts to which the transfer should be made have jurisdiction by the then existing law. It may be further conceded that this

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power extends to cases which, for some reason, get to one court when they should be in another; and to the necessities of the case which may arise when there shall be a change in the districts or in the pecuniary limits of the jurisdiction of the courts of appeals, but it does not follow that these are the only instances in which the power to make transfers of causes may be exercised by the legislative department of the government. The act of March 4, 1885, transfers from the St. Louis court of appeals to this court causes which come within the final jurisdiction of this court and no others; instead of leaving them there with the power of review in this court the act at once brings them here. It does not appear to be contended that the act violates any express provision of the constitution but the claim would seem to be that it is in conflict with the spirit and purpose of the amendment of 1884. That amendment created a system of appeal courts. Their judgments are made final in all cases of which they have jurisdiction, with an exception in those cases where one of the judges shall deem a decision contrary to any former decision of any of said courts, or of the Supreme Court. A manifest purpose had in view by the amendment was to avoid the expense and delay of so many appellate tribunals and to make each of them final so far as was practicable.

The power to transfer causes from a court of appeals to this court is given to the legislature in broad and unqualified language. The only limit which can be fairly placed upon it is that before conceded, for all the purposes of this case. To my mind the recent act of the general assembly is not only warranted by the power reserved to the legislature by the constitutional amendment, but is in keeping and harmony with the purpose and object of that amendment. The case, which, by this proceeding, it is sought to require the court of appeals to proceed and hear, is one of which this court would have jurisdiction, and comes clearly within the act of March 4, 1885. That act is clearly constitutional. The

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writ of mandamus should be denied. Norton and Sherwood, JJ., concur. Henry, C. J., and Ray, J., dissent.

WILLIAMS *et al.* v. TUTT *et al.*

Fraud. The finding of the lower court that a deed to land was obtained by the fraud of the grantee, and that a purchaser from the latter took with notice of such fraud, affirmed.

Appeal from Osage Circuit Court.—HON. A. J. SEAY,
Judge.

AFFIRMED.

Plaintiffs' petition in substance charges: That plaintiffs, Frances and Alvin Williams, are husband and wife; that prior to March 1, 1879, defendant, Samuel Tutt, by repeated misrepresentations that Frances A. Williams (then Frances A. Cavanaugh) was about to be indicted or prosecuted for permitting a man to remain on her place without paying his board, in and by representing to her, said Frances, that under certain "new statutes" in this state, she was liable to be prosecuted and punished, and by repeated and earnest representations that it was necessary for her safety that she should leave the state and put her property out of her hands, and by working upon her fears by such constant, earnest and repeated representations, and by preventing her from consulting her neighbors, by assuring her that such neighbors were on the grand jury, did, about the first day of March, 1879, obtain from said Frances a deed to one hundred and twenty-five acres of land in Osage county, Missouri, to-wit: Southeast quarter of southeast quarter of section ten and north half of northeast quarter of section fifteen,

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township forty-four, range nine, and also her bill of sale for two hundred or three hundred dollars' worth of personal property.

Plaintiffs further state that the father of Samuel Tutt was her tenant, living upon her farm with his family, and that said Samuel had won her confidence by his pretense of great esteem for herself and her children; that he took said deed with the promise, agreement and understanding that when he could find a purchaser for said land, he would sell it and send the money to her and also the proceeds of the sale of the personal property, and that he paid no consideration whatever for the same, but was to have one hundred dollars for attending to said business for her. That on January 14, 1880, said Samuel Tutt made a deed of trust to Henry Haslag, as trustee, to secure a sum of money, about four hundred dollars, borrowed by him of Theodore Heinen, on said land. That on June 1, 1880, Tutt made a deed for said lands to Heinen for about six hundred dollars; that they were really worth about \$1,500. That Tutt for years had been blind, crippled and a county pauper, supported and educated at the expense of Osage county, and Heinen knew these facts, and also knew that Tutt had paid plaintiff nothing for the lands, and had received the deed only in order that he might prove the title thereto to some purchaser thereof, and that he had no right to mortgage or encumber the same, and that it was a fraud in him to make said mortgage. That Heinen and his legal adviser knew all these facts, but held that if the record showed a legal title in Tutt, Heinen could get the land by loaning him four hundred dollars on it, knowing that Tutt could never repay the same, and that said Frances was out of the state, and that said loan was fraudulently made for that purpose. The petition prayed that the mortgage and the other deed by her to Tutt be decreed to be fraudulent and void, and that the title to the lands be vested in her and that it be decreed that

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Heinen convey said lands to her and for other proper relief.

Defendant Tutt filed his answer controverting the averments of the petition, and the court having found against him he did not appeal. Defendant Heinen made a separate answer, stating therein that on June 1, 1880, he purchased the land from Tutt for a valuable consideration; that as to the manner Tutt obtained his title he had no knowledge, except what was derived from plaintiffs' deed to Tutt. He admits the mortgage; says it was given to secure the four hundred dollars loan, and denies any knowledge of the contract of purchase between Tutt and plaintiff, or of any statement made by the former, or of any fear of plaintiff produced by said Tutt, or that he had any knowledge of the fact that Tutt was poor or supported by the county; says that he inquired of the clerk of the circuit court of Osage county and *ex-officio* recorder of deeds, and was advised that the title to said lands was good, and that the taxes were paid. Defendant further denied all the allegations of the petition, except as above stated.

Each side offered evidence in support of the allegations of their pleadings. The court found that the deed of March 1, 1879, by plaintiff to Heinen, was procured by fraud; that Heinen had notice of this fraud when he received from Tutt the deed of June, 1880. The court also found that the evidence was not sufficient to establish notice of any fraud against Heinen, when he loaned the money secured by the mortgage dated January 14, 1880. The absolute deeds from plaintiff to Tutt and Tutt to Heinen were accordingly set aside, while the mortgage was permitted to stand. Heinen prosecuted his appeal, and complains of the action of the court in setting aside the above deeds.

Edwin Silver and R. S. Ryors for appellant, Heinen.

(1) The petition fails to state a cause of action either

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of duress or legal fraud. *Bakewell v. Salilein*, 9 Mo. App. 558; *Harmon v. Harmon*, 61 Me. 229; *Radich v. Hutchins*, 95 U. S. 213; *Jenkins v. Long*, 19 Ind. 28; *Slaughter v. Gerson*, 13 Wall. 379. No principle is better settled than that every person is presumed to know the law, both civil and criminal, and no one can, therefore, complain of the misrepresentation of another respecting it. *Reed v. Sidner*, 32 Ind. 373; *Fish v. Clelland*, 33 Ill. 238; *Burt v. Bowles*, 69 Ind. 1. In an action for a fraudulent misrepresentation, the representation must have reference to a past or present state of things. *Stocking v. Howard*, 73 Mo. 25; *Gallager v. Brund*, 6 Cow. 345; *Gage v. Lewis*, 58 Ill. 604; *Burt v. Bowles*, 69 Ind. 1. (2) The representation charged in the petition to have been made by Tutt, that plaintiff was liable to indictment and would be indicted for keeping a man on her place without charging him board whether actually made or not, was so palpably absurd and ridiculous that no one, whether male or female, possessing the least conceivable amount of sense, could possibly have been misled thereby. In such a case no relief will be granted. Story's Eq. Jur. (11 Ed.) sec. 199; Bispham's Eq. 270; *Ins. Co. v. Reed*, 23 Ohio St. 292; Bouvier's Dict., *Fraud*. (3) The alleged misrepresentation was at most as to a matter of law and plaintiff can have no relief therefrom. *Burt v. Bowles*, 69 Ind. 1; *Reed v. Sidner*, 32 Ind. 373; *Fish v. Clelland*, 33 Ill. 238. (4) A party cannot set up his own fraud as a ground for relief. *Hamilton v. Scull*, 18 Mo. 166; *Bell v. Greenwood*, 21 Ark. 250. (5) Plaintiff's only remedy is an action against Tutt for the proceeds of the sale of the land wrongfully withheld by him. The right to disaffirm a contract for fraud must be exercised promptly and the disaffirmance must be *in toto*. *Estes v. Reynolds*, 75 Mo. 573. (7) Heinen was an innocent purchaser for a valuable consideration and is protected on that ground. *McNeill v. Jordan*, 28 Kan. 7; *Trigg v. Taylor*, 27 Mo. 245; *Bank v. Armstrong*, 62 Mo. 67; *Whittlemore v.*

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Obear, 58 Mo. 278; *Somers v. Breller*, 2 Pick. 184; *Deputy v. Stapleford*, 19 Cal. 302; *Weaver's case*, 42 Ia. 343.

Hamilton & Fisher and *N. C. Kouns* for respondents.

The mortgage and deed of trust were both procured by Tutt from plaintiffs through fraud. And the evidence shows that Heinen had knowledge of such facts as put him on inquiry as to the title he acquired, and that he failed to avail himself of the opportunity to make such inquiry and he will, therefore, not be protected. "Where a purchaser has knowledge of any fact sufficient to put a prudent man upon inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of some right, or title, in conflict with that he is about to acquire, it is his duty to make the inquiry, and if he does not make it he is guilty of bad faith or negligence to such an extent that the law will presume that he made it, and will charge him with the actual notice he would have received if he had made it." *Cambridge Valley Bank v. Delano*, 48 N. Y. 326; *Wade on Notice*, secs. 10, 17, 36; 47 Mo. 304; 40 Mo. 405; 64 Mo. 507.

PER CURIAM.—The evidence fully sustains the finding of the court, viz.: that Tutt procured the deed from Mrs. Williams by fraud. That Heinen lent the money to Tutt, and took a mortgage to secure its payment, without knowledge that the deed to Tutt from Mrs. Williams was procured by fraud. That when Tutt sold him the land and made him a deed conveying it to him, Heinen had notice of the fraud by which Tutt had procured the deed from Mrs. Williams.

There was no foreclosure of the mortgage, but the land was sold and conveyed to Heinen by Tutt after the execution of the mortgage. The court by its decree set aside the deed from Tutt to Heinen, and that from Mrs. Williams to Tutt, and reinvested Mrs. Williams with the

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title to the land subject to the mortgage, and, we think, that by the decree exact justice was meted out to the parties to this cause, and the judgment is affirmed.

MOODY, *Plaintiff in Error*, v. CASS COUNTY.

1. **Roads, Construction of: ROAD AND CANAL FUND.** A contractor for the construction of public roads could be paid under Revised Statutes, 1855, only out of the road and canal fund.
2. **County Warrant: SPECIAL FUND.** One who accepts a warrant on a special fund, cannot look to another for its payment.

Appeal from Cass Circuit Court.—HON. N. M. GIVAN,
Judge.

AFFIRMED.

Railey & Burney for plaintiff in error.

(1) The assignor of plaintiff was a general creditor of defendant. *International Bk. v. Franklin Co.*, 65 Mo. 113; *Clark v. Des Moines*, 19 Ia. 199. (2) The records of the county court should show the proceedings and contracts of the court. *Milan v. Pemberton*, 12 Mo. 602; *Dennison v. St. Louis Co.*, 33 Mo. 171; *Maupin v. Franklin Co.*, 67 Mo. 329. The decision of the lower court was wrong, because it is admitted in the record of this case that the only entry made by the county court concerning the services of Bouse as road overseer, was the one as follows: "Ordered that a warrant issue to John Bouse for \$295.40 on road and canal fund for his services as road overseer." There was, therefore, no evidence of any agreement having been made by Bouse with the county court to look to the road and canal fund for his pay. (3) A county warrant when drawn is in effect a

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promissory note. *Floyd Co. v. Day*, 19 Ind. 450; 65 Mo. 113; 19 Ia. 199. The giving of a promissory note is not a payment of the original indebtedness, unless it be so agreed between the parties. *Colebrooke on Collateral Securities*, sec. 29, and cases cited; *Steamboat Charlotte v. Hammon*, 9 Mo. 59; *Murray et al. v. Taylor*, 30 Mo. 263; *Howard et al. v. Jones et al.*, 33 Mo. 583. (4) The suit mentioned in the answer, and on which defendant relied to support its plea of *res judicata*, was not upon the warrant, but was an action for conversion of funds belonging to the road and canal fund, which instead of being set apart for the payment of said warrant, were transferred to some other fund and used for other purposes. (5) The assignment of the warrant to plaintiff was an equitable assignment of the debt itself. *Walker v. Mauro*, 18 Mo. 564; *Bk. v. Bogy*, 44 Mo. 18; *Jones v. Hurst*, 67 Mo. 572.

Wm. L. Jarrott and H. Clay Daniel for defendant in error.

It is to be inferred from the acceptance by Bouse of the warrant on the road and canal fund that he agreed to look to that fund alone for payment of his claim. *Moody v. Cass Co.*, 74 Mo. 307; *State, etc., v. Macon Co.*, 68 Mo. 29; *Kingsbury v. Pettis Co.*, 48 Mo. 207; *Campbell v. Polk*, 49 Mo. 214, and 76 Mo. 57.

PER CURIAM.—This was a suit brought by plaintiff to recover \$295.40 for work and labor alleged to have been performed by plaintiff's assignor as road overseer. The defendant answered alleging that the work and labor was performed, but at the time due was adjusted and paid by the county by the issue and delivery of a county warrant for the amount on the road and canal fund, and then and there accepted with a full knowledge of all the facts, etc. As a further answer it is alleged that in 1875 plaintiff sued the defendant on the warrant issued and accepted as above stated; and re-

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covered judgment for, and received on said judgment, all the money in the road and canal fund in Cass county, etc. The plaintiff in his reply admitted that his assignor, John Bouse, at the time said warrant was issued to him, believed the road and canal fund to be the most reliable in Cass county and accepted the same in good faith believing it would be paid, etc.

The evidence tended to prove that the work and labor performed was the building of a public road between Harrisonville in Cass county and Warrensburg in Johnson county. That the assignor, Bouse, accepted the warrant on the road and canal fund in payment therefor; and that he so received it because "said road and canal fund at the time said warrant was issued, was the only fund in Cass county on which warrants when drawn were considered worth their face." This road and canal fund was one which was applicable "to the construction and improvement of roads, bridges or canals, and to no other object." R. S., 1855, p. 1365, sec. 10.

I. It would be inferred in the absence of evidence to the contrary, that for such service, and the acceptance of a warrant on the road and canal fund without objection, that the payee would look to that fund alone for payment. It would amount to an agreement with the county, to look to that fund for compensation. And in such case he would not be permitted, after exhausting that fund, to then seek payment from some other. *Moody v. Cass County*, 74 Mo. 307.

II. The only distinction between the case at bar and several others decided by this court, is, that in those cases the suits were upon the warrants themselves, whilst here, an attempt is made to recover on a contract, and ignore the warrant. But the facts here show clearly the services rendered, as being that character of service, constructing public roads, which must be paid out of a particular fund, and that the payee accepted a warrant for his services on that identical fund knowingly, giving as a reason therefor that that was the only fund on

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which the warrants were worth their face value. This work was done as a contractor and not as road overseer. The evidence clearly shows this. As a contractor for constructing a road he could only, under the law of 1855, be paid out of the road and canal fund, and not out of the county treasury, or out of the road tax of his district, as provided in section sixty-one, Revised Statutes, 1855, page 1379.

Having accepted a warrant on the special fund, which is exhausted, he cannot look to any other. This has been so held in 74 Mo. *supra*; *Kingsberry v. Pettis Co.*, 48 Mo. 207; *Campbell v. Polk Co.*, 49 Mo. 214; and in *State ex rel. Watkins v. Macon Co.*, 68 Mo. 29.

We think it very clear that the judgment of the circuit court should be affirmed, and it is so ordered.

TACKETT, *Administratrix*, v. VOGLER, *Appellant*.

1. **Jurisdiction: SPECIAL TAX BILLS: CIRCUIT COURT OF JACKSON COUNTY.** The circuit court of Jackson county has concurrent jurisdiction with the recorder of Kansas City and justices of the peace of actions to enforce the liens of special tax bills when the amount sued for is three hundred dollars or less (overruling *Williams v. Payne*, 80 Mo. 409).
2. ———. Where a court possesses jurisdiction over a subject, the mere vesting of jurisdiction over the same subject in another court will not exclude the jurisdiction of the former court. To effect such result express words of exclusion must be used or the law conferring jurisdiction on the first court must be repealed.

Appeal from Jackson Circuit Court.—HON. F. M. BLACK, Judge.

AFFIRMED.

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C. E. Small and R. H. Field for appellant.

(1) The circuit court had no jurisdiction of the amount involved in this cause. Acts 1873, 253 and 255; *Hunt v. Hopkins*, 66 Mo. 98; *Stamps v. Bridwell*, 57 Mo. 22; *Williams v. Payne*, 80 Mo. 409. (2) The circuit court erred in refusing to sustain defendant's demurrer to the evidence; the ordinance should have specified the materials to be used in the construction of the street, in making fills and embankments. *Richardson v. Haydenfeldt*, 46 Cal. 68; *People v. Clark*, 47 Cal. 456; *Bryan v. City of Chicago*, 60 Ill. 507; *Foss v. City of Chicago*, 56 Ill. 354; *Dougherty v. Hitchcock*, 35 Cal. 512.

Jas. F. Mister for respondent.

(1) The circuit court had jurisdiction. Where a court originally possesses and exercises jurisdiction over a subject, and afterwards similar jurisdiction is given another court (or tribunal), *it is in such case concurrent jurisdiction*, whether so called in the statute or not. There must be words of limitation to take it away, either by using the word *exclusive*, or by repealing the former act giving jurisdiction. *State ex rel. Renick v. St. Louis Circuit Court*, 38 Mo. 402, 408, *citing and adopting Commonwealth v. Hudson*, 11 Gray (Mass.) 65. (2) In cases where the jurisdiction given *is in terms exclusive*, then by implication all other courts are prohibited from exercising jurisdiction, *but not otherwise*. *Wernecke v. Kenyon*, 66 Mo. 284; *Dodson v. Scroggs*, 47 Mo. 287; *Pearce v. Calhoun*, 59 Mo. 273; *Cones v. Ward's Adm'r*, 47 Mo. 289; *State v. Wister*, 62 Mo. 592; *State v. Harper*, 58 Mo. 531. (3) The same doctrine—that the jurisdiction of superior courts can be taken away only by express negative words of a statute, or by irresistible implication—is held by the courts of other states, as in

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Alabama, Tennessee, Pennsylvania, Massachusetts and Iowa, and by all the courts in this country and England. *Gould v. Hayes et al.*, 19 Ala. 450; *Murfree v. Leeper*, 1 Overton (Tenn.) 1; *Burginhafer v. Martin*, 3 Yeates (Pa.) 479; *Overseers, etc., v. Smith*, 2 Serg. & R. (Pa.) 363; *Commonwealth v. McClosk*, 2 Rawle (Pa.) 369; *Commonwealth v. White*, 8 Pick. (Mass.) 453; *Commonwealth v. Hudson*, 11 Gray (Mass.) 65; *Wright v. Marsh*, 2 Greene (Iowa) 94. The cases of *Stamps v. Bridwell*, 57 Mo. 22, and *Williams v. Payne*, 80 Mo. 409, should be overruled.

NORTON, J.—The petition in this case, which was filed in the circuit court of Jackson county, declares upon six special tax bills amounting in the aggregate to \$130.32, exclusive of interest, and on the trial plaintiff obtained judgment, from which the defendant has appealed to this court.

The controlling question in the case is: Did the circuit court have jurisdiction over such a suit? In the case of *Williams v. Payne*, 80 Mo. 409, which followed the case of *Stamps v. Bridwell*, 57 Mo. 22, it was held in suits upon special tax bills originating under the charter of the City of Kansas, that the recorder of said city and the justices of the peace had exclusive jurisdiction when the tax bill sued upon did not exceed three hundred dollars. If the opinion in that case and the one upon which it is based are to be adhered to the question propounded must be answered in the negative. On a reconsideration of the question involved, the various provisions of the city charter and the other ruling, of this court, which will be adverted to in this opinion, we have reached the conclusion that the jurisdiction of the circuit court of Jackson county in suits to recover such tax bills is exclusive when the amount sued for exceeds three hundred dollars, and that its jurisdiction is concurrent with that of the recorder and justices of the peace when the amount sued for is three hundred dollars, or

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less than three hundred dollars, and that the rule announced in the cases above referred to should be no longer adhered to.

The case of the *State ex rel. Renick v. St. Louis County Court*, 38 Mo. 403, establishes the principle that when a court originally possesses and exercises jurisdiction over a subject its authority to proceed will not be divested or impaired by any subsequent legislative enactment, unless express prohibitory words are used. In the opinion the case of *Commonwealth v. Hudson*, 11 Gray 65, was approvingly quoted, where it is said that the jurisdiction conferred upon the court of common pleas in certain criminal cases was not ousted by a subsequent statute, which enacted that justices of the peace should have jurisdiction of all offences of the kind designated, the jurisdiction of which had before been exercised by the common pleas court. It was contended in that case that the subsequent enactment vested the exclusive jurisdiction over such offences in justices of the peace. Shaw, C. J., in disposing of the question said: "Taking the language of the statute as it is, what is the effect of this section? Before this statute, the court of common pleas had jurisdiction over this subject matter. Is that jurisdiction taken away? It is no answer to say that another tribunal has jurisdiction, for that is very common. It is in such case concurrent jurisdiction, whether so called in the statute or not. Then, is the jurisdiction of the common pleas which it had before taken away? There must be words of limitation to take it away; either by using the word 'exclusive,' or by repealing the former act giving jurisdiction, by which it may appear that the legislature intended not only to confer jurisdiction on justices of the peace, but also to take away the other jurisdiction."

Section four of the charter of the City of Kansas (Laws 1875, p. 252), after declaring that special tax-bills shall be a lien on the property described, provides that "every such tax bill and the lien thereof shall be as-

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signable and any such tax bill with interest * * * may be collected by suit by the contractor to whom issued in his own name or by an assignee thereof, in his name, in any court of competent jurisdiction." See also, *Stewart v. Caldwell*, 54 Mo. 536, and *Primm v. Raboteau*, 56 Mo. 407. It is clear that under the provision above quoted the circuit court of Jackson county was a court, of competent jurisdiction to entertain suits on any such tax bill, without reference to amount, and was the only court under the provision above quoted, considered by itself, which could exercise jurisdiction in such cases, with the exception of the special law and equity court then in existence. The subsequent provision contained in the same section, which declares that "when the amount due on any tax bill does not exceed three hundred dollars suit may be brought thereon before the recorder of the city, or any justice of the peace in said city, as in other civil cases," cannot have the effect under the ruling and reasoning in the case of *State ex rel. Renick v. St. Louis Co. Court*, *supra*, to make the jurisdiction of the recorder or justices of the peace in tax bill suits, when the amount sued for is three hundred dollars and less, exclusive, but only has the effect in such cases to make the jurisdiction of the circuit court concurrent instead of exclusive, as it would have been, but for the permission given to bring such suits before a recorder or a justice of the peace.

The whole section taken together discloses a legislative intent to require all suits founded on tax bills, amounting to more than three hundred dollars, to be brought in the circuit court, and to permit or allow suits on tax bills, amounting to three hundred dollars and less, to be brought before the recorder or justices of the peace, or in the circuit court, as the owner thereof might elect.

The objection to the validity of the taxbill, based upon alleged non-conformity of the ordinance with the charter, is too technical and unsubstantial to require

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consideration. Upon the whole record the judgment is for the right party and it is hereby affirmed. All concur.

DESKINS, *by Guardian*, v. GOSE, *Appellant*.

1. **Public Schools: RULES: TEACHER.** A public school teacher, by the very nature of his employment, has the right to make needful rules for the government of the school, where the directors fail to do so, as authorized by the statute. R. S., sec. 7045.
2. ———: ———: ———. A rule forbidding scholars from quarreling and using profane language on their way home is reasonable and needful, and the teacher can punish them for its infraction.

Appeal from Grundy Circuit Court.—HON. G. D. BURGESS, Judge.

REVERSED.

R. A. Debolt for appellant.

(1) It is the duty of the school board to make all needful rules for the government of the pupils (R. S., sec. 7045); but if it fails to do so, the teacher has the right, and must, of necessity, make such rules. *Danenhoffer v. State*, 35 Am. Rep. 216, 219. (2) The rule of the teacher against profane swearing and fighting by pupils, either at school or on their way home, was reasonable and proper. *Burdick v. Babcock*, 31 Iowa 565; *King v. Jefferson City School Board*, 71 Mo. 628; *Sewall v. Board of Education*, 29 Ohio St. 89. (3) While pupils are in his charge he stands *in loco parentis*, and the law gives him the power and authority in proper cases, to inflict corporal punishment upon the refractory. *State ex rel. Burfee v. Burtin*, 30 Am. Rep. 706; *Dan-*

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enhoffer v. State, 35 Am. Rep. 216, 219; *Dritt v. Snodgrass*, 66 Mo. 297, 298; *Cooper v. McJunkin*, 4 Ind. 291; *Commonwealth v. Randall*, 70 Mass. 37; 1 Broom & Hadley's Commentaries, p. 381, note 168; *State v. Mizner*, 24 Am. Rep. 769, and note, also 771; Whar. on Crim. Law, sec. 1269. (4) The teacher has the right to punish a pupil on his return to school for an infraction of the rules committed on the way home after school has been dismissed for the day. *Dritt v. Snodgrass*, 66 Mo. 286.

E. M. Harber for respondent.

NORTON, J.—This suit was brought to recover damages for alleged injuries inflicted by defendant on plaintiff in whipping him with a switch. The answer of defendant sets up that he was a teacher of a public school; that plaintiff was one of the pupils of said school, and that for a violation by plaintiff of a rule of the school, in using profane language, quarreling and fighting with the other scholars of the school, he did, in order to preserve good order and discipline in the school and to promote its usefulness, chastise plaintiff with a switch, inflicting upon him reasonable and moderate punishment. Plaintiff obtained judgment for nine dollars, from which the defendant has appealed.

On the trial plaintiff offered evidence tending to show that the punishment inflicted was excessive; that plaintiff did not use profane language to, or quarrel or fight with, the other scholars. The defendant offered evidence tending to prove the facts set up in his answer, and the following agreed statement of facts was then read to the jury, viz.:

"That the defendant was at the time the employed teacher of the public school at which the plaintiff was a regular daily attendant on and during the day that the acts and conduct complained of occurred, and for which the defendant chastised him; that the profane language

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used, the quarreling and fighting was done, if at all, one-half or three-fourths of one mile from the school house, after the school had been adjourned for the day, and the scholars were on their way to their respective homes, and before they had reached them, and the punishment was inflicted the next day thereafter, when the plaintiff returned to the school; that the defendant, as teacher, had a standing rule against the use of profane language, quarreling or fighting among the scholars, either at the school house or on their way home, and often spoke of the rule in the presence of the school and the plaintiff; that plaintiff was, at the time of the chastisement, thirteen years of age, and that all this occurred in the county of Grundy, Mo."

The court then instructed the jury that under the evidence and pleadings the jury must find for the plaintiff, and refused to give several instructions asked by the defendant, to the effect that plaintiff, while in attendance as a scholar, was under the control of defendant as teacher, and that defendant had a right to punish him for an infraction of the rule put in evidence in the agreed statement of facts, and that the verdict of the jury should be for defendant unless they believed that the punishment inflicted was unreasonable or excessive.

It is this action of the court which is complained of as error, and we are of the opinion that the complaint is well founded. While it is provided in section 7045, Revised Statutes, that "the board shall have power to make all needful rules and regulations for the government of the school in their district," if they failed to do so, the right of the teacher employed to conduct the school to adopt reasonable rules to promote good order and discipline, arises out of the very nature of his employment, and the only question worthy of consideration which this record presents is, was the rule which forbade the use of profane language, quarreling and fighting among the scholars, either at school or on their way home, reasonable and promotive of good order and

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proper discipline of the school? It must be conceded without question that the rule, in so far as it forbade such acts on the part of the scholars while at school, was not only reasonable, but necessary to the orderly conduct of the school. But it may be insisted, and doubtless was urged before the trial court, that so soon as the scholars were dismissed from school by the teacher, his authority over them ceases, and that of the parent is resumed, and that, therefore, that portion of the rule which forbids such acts as are therein mentioned, while the scholars are on their way to their homes, is without sanction or authority. We are unwilling to go to this extent, believing it to be unsupported either by reason or weight of authority.

In the case of *Dritt v. Snodgrass*, 66 Mo. 286, this court went to the extent of saying that when the pupil of a public school is released and sent back to his home, neither the teacher nor directors had any authority to follow him to his home and govern his conduct while under the parental eye. This court also held in the case of *King v. Jefferson City School District*, 71 Mo. 628, sustained the validity of a rule that provides that "any pupil absent six half days in four consecutive weeks, without satisfactory excuse, shall be suspended from school." In that case a pupil had played truant, and thereby became amenable to the operation of the rule, and was expelled, and this court refused to interfere on the ground that the rule was a reasonable one. Truancy is an act committed out of the school room, but being subversive of the good order and discipline of the school, may subject, as it did the scholar in this case, to suspension or expulsion. If the effect of acts done out of the school room while the pupils are returning to their homes, and before parental control is resumed, reach within the school room, and are detrimental to good order and the best interests of the school, no good reason is perceived why such acts may not be forbidden, and punishment inflicted on those who commit them. *Burdick v. Bab-*

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cock et al., 31 Iowa 562-7; *Lander v. Seaver*, 32 Ver. 114; *Sherman v. Inhabitants of Charlestown*, 8 Cush. 160.

The effects of the scholars using to and with each other obscene and profane language, quarreling and fighting among themselves on the way to their homes, would necessarily be felt in the school room, engender hostile feelings between scholars, arraying one against the other, as well as the parents of each, and destroying that harmony and good will which should always exist among the scholars who are daily brought in contact with each other in the school room.

For the error committed in giving the plaintiff the first and second instructions, and refusing those asked by the defendant, numbered two, three, four, five and seven, the judgment will be reversed and the cause remanded. All concur.

 SKINNER, *Appellant*, v. WILLIAMS.

1. **Tax Deed.** The objection that the tax deed by the city collector of Kansas City did not show on its face that the land was sold at the collector's office, and that it was void on its face; *held*, not well taken.
2. —: **STATUTE OF LIMITATIONS.** The statute of limitations begins to run in favor of a tax deed, not void on its face, from the time it is recorded.

Appeal from Jackson Circuit Court.—HON. F. M. BLACK,
Judge.

AFFIRMED.

Karnes & Ess and *R. H. Field* for appellant.

The place, and only place for a tax sale, under the

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charter of Kansas City, is at the collector's office. Laws 1875, p. 232, sec. 45. The form prescribed requires that a tax deed shall *affirmatively show*, that the property therein conveyed *was sold at public sale at the collector's office*. Laws 1875, p. 237, sec. 64. Does it *affirmatively appear from the face of this deed* that the city auditor bid off the real property therein conveyed *at the collector's office*? We submit that it does not, and is, therefore, not good on its face, nor in conformity with the charter requirements. *Thompson v. Merriam*, 15 Neb. 498; *Towle v. Holt*, 14 Neb. 227, and cases cited; *Park v. Tinkham*, 9 Kan. 615; *Shelly v. Towle*, 20 N. W. Reporter 251; *Vassar v. George*, 47 Miss. 713; *Culver v. Hayden*, 1 Vt. 363-364; *Yankee v. Thompson*, 51 Mo. 239; *Thompson v. Lawrence*, 2 Baxt. (Tenn.) 415. The auditor had no right to bid it off for the city elsewhere. *Cooley on Taxation*, 338; *Ruby v. Huntsman*, 32 Mo. 501; *Miller v. Corbin*, 46 Ia. 150. When a tax deed is good and sufficient on its face to make it *prima facie* evidence of a good title it may be shown in opposition thereto by evidence *aliunde*, that the sale was actually void, but if a deed is not good on its face for any illegal recital, or for lack of an essential recital, the person claiming under the tax deed, *cannot* bolster it up or cure the defect on its face by evidence *aliunde* of the deed. *Macey v. Clabaugh*, 1 Gilman (Ill.) 26; *McDermott v. Scully*, 27 Ark. 226; *Pack v. Crawford*, 29 Ark. 483; *Grim v. O'Connell*, 54 Cal. 522; *Cartwright v. McFadden*, 24 Kan. 662; *Larkin v. Wilson*, 28 Kan. 514-515; *Lessee of Kellogg v. McLaughlin*, 8 Ohio 116; *Proprietors of Cardigan v. Page*, 6 N. H. 182. And no presumption can be indulged to uphold the face of this deed (if it is defective) that the auditor was in attendance upon the sale at the collector's office when he made the bid recited, or that he entered the fact and date of his bid of record in the book of sales as required by law. *Morton v. Reeds*, 6 Mo. 64; *Williams v. Underhill*, 58 Ill. 137; *Long v. Burnett*, 13 Ia. 29; *Hubbard v. John-*

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son, 9 Kan. 632; *Yankee v. Thompson*, 51 Mo. 238-9. The statute makes only a deed that is good on its face *presumptive* evidence that the things required by law to be done to warrant its execution, had been done. Laws 1875, sec. 64, p. 238; Cooley on Taxation, 332; *Cunningham v. Ry. Co.*, 61 Mo. 33.

C. O. Tichenor for respondent.

The only fault found with the form of the deed is, that it does not show that the lot was bid off by the city at the collector's office. The deed does show that it was *bid off* for the city by the city auditor, at the direction of the comptroller; that it was offered for sale at the collector's office on January 15, 1876, between the hours of ten a. m. and five p. m.; and that inasmuch as it could not be sold for the amount of all taxes, interest, and costs, then due and unpaid upon said property, "at the place aforesaid," it was *bid off* for the City of Kansas for such amount; and that thereupon the city auditor made record of the same in the book of sales, as required by law. The construction is technical, unfair and forced, and should not be adopted by this court. *Giekie v. Kirby Carpenter Co.*, 106 U. S. 385; *Mansean v. Edwards*, 53 Wis. 461; *Haynes v. Heller*, 12 Kan. 381; *Marshal v. Benson*, 48 Wis. 558; *Sams v. King*, 18 Fla. 558. Certainly, under the provisions of the charter, the presumption must obtain that the officers did their duty. *Biscoe v. Coulter*, 18 Ark. 434; *Hazzard v. Hancock*, 39 Ind. 177. There is but one place of sale. In Nebraska there are several places, and hence the ruling of the Supreme Court. *Halls v. Blaco*, 10 Neb. 36. The sale to the city is not, strictly speaking, by bid (see authorities cited by appellant), it is what is generally termed a *forfeiture*, because of lack of a bidder. *Hodgdon v. Wight*, 36 Me. 338; *Kittle v. Shervin*, 11 Neb. 65; *Wild v. Serpel*, 10 Gratt. 408. The form for a deed in the charter does not contain any statement as to where the bid was made by the city, hence, if there is nothing in

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the deed showing it, the most that can be claimed from the omission is that the deed is not evidence of it. *Abbot v. Lindenbower*, 46 Mo. 295; *Moss v. Shear*, 25 Cal. 38; *Bowman v. Cockrill*, 6 Kan. 311. And appellant has supplied the omission by his testimony. Inasmuch as the competitive bidding was the matter in which the delinquent was interested, and no injury could arise to him, whether the city elected to consider the land forfeited to it either in the collector's office or outside of it. *Biscoe v. Coulter*, *supra*; *Bowman v. Cockrill*, *supra*, 325. By section sixty-five, persons calling in question the title or right of grantee in the tax deed, shall be required to prove, in order to defeat the same that taxes, interest, and costs were paid before sale; that the land was not subject to taxation; that it had been redeemed, or that there had been a tender of the redemption money. This provision in an act of congress was sustained by the Supreme Court of the United States in *DeTreville v. Smalls*, 98 U. S. 517, and in *Keely v. Saunders*, 99 U. S. 441.

HENRY, C. J.—This is an action of ejectment for the recovery of a lot or parcel of land lying in the City of Kansas. The petition is in the usual form, and in addition to a general denial the answer sets up title in defendant, under a deed from the city collector to one W. E. Sheffield, which was made and executed under a sale of the same for city taxes, which deed was recorded in the office of the recorder of deeds of Jackson county, more than three years before the commencement of this suit. Defendant claims under Sheffield, grantee in the tax deed.

Conceding that but for the tax sale and deed, plaintiff is entitled to recover the land, the question arises, is plaintiff barred by the special statute of limitations contained in section sixty-six, article six, of the charter of the City of Kansas, which is as follows: "Any suit or proceeding against the purchaser at a tax sale, his heirs or assigns, for the recovery of the real property, or

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any interest therein sold for taxes, or to defeat, or avoid a sale, or conveyance of real property sold for taxes under the provisions of this act, shall be commenced within three years from the time of the recording of the tax deed and not thereafter." Section sixty-eight, article six, of said charter, reads as follows: "Any person putting on record a tax deed, executed substantially as provided for in this act, shall be deemed to have set up such a title to the real property described in such deed as will enable the party claiming to own such real property to maintain an action for the recovery of the possession thereof against any person claiming under the tax deed, *whether such person is in actual possession of the lands or not.*"

It has been decided by this court at the present term, that a tax deed void upon its face will not set the special statute of limitations in motion, whether the grantee in the tax deed entered upon and held possession of the property for three years or not, but that a tax deed good upon its face will set the statute in motion. *Mason et al. v. Crowder, post, p. —.*

It only remains to consider whether the tax deed in question is void upon its face or not. The form prescribed requires that a tax deed shall affirmatively show that the property conveyed was sold at public sale, at the collector's office, and appellant's counsel contend that the deed in question does not show that fact. Section sixty-four, article six, of the charter of the City of Kansas, declares that: "Tax deeds executed by the city collector, shall be substantially in the following form:" Then the form is given and it contains the statement that the collector did expose the lot or parcel of land to public sale at the office of the city collector. The deed in question, after describing the property and stating that it was subject to taxation for certain years named, and that the taxes for said years remained due and unpaid at the date of the sale thereafter mentioned, proceeds as follows: "And whereas the city collector of the said City of Kansas did, on the fifteenth day of

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January, 1876, by virtue of the authority vested in him by law, at an adjourned sale, the sale having been begun and publicly held on the first Monday of November, 1875, the first day on which the said real property was advertised for sale, expose to public sale at the office of the city collector in the City of Kansas aforesaid, between the hours of ten o'clock in the forenoon and five o'clock in the afternoon, in conformity with all the requisitions of the statute in such case made and provided, the real property above described for the payment of taxes, interest, and costs then due and unpaid upon said real property; and, whereas, at the place aforesaid, said property could not be sold for the amount of all taxes, interest, and costs thereon, and, whereas, the city auditor, having been directed by the comptroller so to do bid, did off said property for the City of Kansas for such amount."

The statute does not require that the tax deed shall be a literal copy of the form, but that it shall substantially comply with it. Upon the face of the deed in question, it clearly appears that the lot in controversy was exposed to public sale at the office of the city collector. It could not have literally followed the form given, because no form is prescribed when the purchase is made by the city. It was followed as far as applicable, literally, and the prescribed form does not require the deed to show where the city auditor purchased for the city. If it be that the city auditor could purchase for the city only at the office of the city collector, does it not appear upon the face of this deed that he did bid off for the city the lot in controversy at the collector's office? The recital is: "And, whereas, at the place aforesaid, said property could not be sold, * * * and, whereas, the city auditor, having been directed by the comptroller so to do, did bid off," etc. The recital of the direction given by the comptroller so far separates the recital of the act of bidding from the words "whereas, the city auditor" as to obscure the connection between the first recital that "at the place aforesaid," etc., and the recital that the city auditor bid off said property for the city.

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Transposed, the sentence meaning the same as in its present form, reads as follows: "And, whereas, at the place aforesaid, said property could not be sold * * * and the city auditor did bid off said property for the City of Kansas for such amount, having been directed by the comptroller so to do." We think that such is the fair meaning of the recital. The expression "*bid off*" has application to public or competitive sales, and no one reading this deed, taking and construing all its recitals together, could have any doubt that the city auditor bid off the lot at the same place at which it had been exposed to public sale.

This is the only objection urged against the deed, so far as its recitals are concerned, but, if we are in error as to the proper construction of the above recital in the deed, yet the charter simply provides that: "If any tract, or parcel of real property cannot be sold for the amount of all taxes, interest, and costs thereon, the city auditor shall, if so directed by the comptroller of the city, bid it off for the city for such amount." Sec. 50, art. 6. It is not expressly provided that it shall be bid off by the city auditor at the office of the collector, but by a fair construction of the section, we think, that is its meaning, from the employment of the words "*bid off*," which, as before stated, are only applicable to public or competitive sales; but if this inference is warranted from the employment of those words in the section in that connection, is it not an equally fair inference from the employment of the same words in the above recital of the deed, that it was bid off for the city at the public sale, at the time and place designated in the recital? But a complete answer to the objection to this deed is, that the form prescribed is for a deed to a purchaser, other than the city and in the form prescribed, the recital that the purchase by the city was made at the collector's office is not to be found. The deed is, therefore, not void upon its face, and the moment it was recorded, the statute of limitations was set in motion.

The defendant had a judgment below, and for the above reasons, it is affirmed. All concur.

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THE AMERICAN WINE COMPANY, *Appellant*, v. SCHOLER.

1. **Execution Sale, SETTING ASIDE OF.** Where, on inquiry at the office of the sheriff by the attorney of a defendant in an execution, he is informed by a deputy in charge of the office, that the sale of the property levied on, consisting of three hundred and thirty-three shares of stock in a corporation, will take place at twelve o'clock on the day of sale, and subsequently the sale is made in mass at ten o'clock, in the absence of the defendant or his attorney, and without their knowledge and at a great sacrifice of the value of the property, such sale will be set aside, on timely application, on motion of defendant.
2. ———. A court has power over its own process and can set aside an execution sale, on motion, certainly, at or before the return term of the writ.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Krum & Jonas for appellant.

(1) The motion of respondent is an attempt to state a bill in chancery to set aside a sheriff's sale, but the necessary and essential charges of a bill in equity are not made. Nor could the court obtain jurisdiction of a party not in court without summons and on mere notice. (2) It is only claimed by defendant that the sale is *voidable*. A sheriff, in making a sale under an execution, acts as the ministerial officer of the law, and not as the organ of the court. He is not its instrument or agent (as in case of *judicial* sales), and the court is not the vendor. *Bac. Ab. Sheriff, m; Freeman v. Hunt*, 3 Dana, 614; *South v. Maryland*, 18 How. 396; *Griffith v. Fowler*, 18 Vt. 394. A purchaser at sheriff's sale is not affected by any irregularity in the sheriff's proceedings in making sale under an execution, unless he has participated in occasioning it, or there has been some departure from the requirements of the law for some fraudulent purpose.

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The irregularity must be such as to render the whole proceeding a nullity. *Draper et al. v. Bryson et al.*, 17 Mo. 71; *Weber v. Cox*, 6 T. B. Mon. 110; *Howe v. Starkweather*, 17 Mass. 240; *May v. Thomas*, 48 Me. 397. It is the policy of the law that the title of purchasers acquired under execution sales shall be maintained, and a sale may be valid though the statutory requirement may not have been complied with by the sheriff in making such sales. Freeman on Ex., pp. 566-7, secs. 342, 343; *Weber v. Cox*, 6 T. B. Monroe, 110; *Howe v. Starkweather*, 17 Mass. 240; *Lenox v. Clark*, 52 Mo. 115; *May v. Thomas*, 48 Me. 397; *Little v. Zunzts*, 2 Ala. 260. A sale of personal property under execution, if fair, and the execution be valid, carries to the purchaser the title and right of the debtor to the property, if the purchaser himself is not in fault. *Hamilton v. Shrewsbury*, 4 Rand. 427; *Ponder v. Mosely*, 2 Fla. 207; *Hobein v. Murphy*, 20 Mo. 447; *Lenox v. Clark*, 52 Mo. 115; *Lawrence v. Speck*, 2 Bibb. 40; *Pollard v. King*, 63 Ill. 36; *Curd v. Lackland*, 49 Mo. 451; *Smith v. Randall*, 6 Cal. 47; *Houck v. Cross*, 67 Mo. 151. (3) The sale was not void by reason of any custom to sell personal property at twelve o'clock instead of ten o'clock. It is the statute that controls the sale, not custom. (4) Inadequacy of price was no ground for setting aside the sale, and there are no circumstances connected with the sale to raise the presumption of fraud. *Hannibal v. Brown*, 43 Mo. 294; *Boyd v. Ellis*, 11 Ia. 102; *West v. Davis*, 4 McLean, 241; *Dutcher v. Leake*, 44 Ill. 398; *Cohen v. Wagner*, 6 Gill & Johnson, 236; *Nesbit v. Dallam*, 7 Gill & Johnson, 494. (5) Circumstanced as the stock was, the sheriff, who, in legal contemplation, was the agent of both the plaintiff and defendant, exercised his discretion wisely in selling the stock *en masse*. *Rector v. Hartt*, 8 Mo. 460; *Hammond v. Scott*, 12 Mo. 8; *Lisa v. Lindell*, 21 Mo. 133. There is a total failure of evidence to sustain the action of the trial court, and this court will, in such case, interfere with finding on the evidence. *Hearne v. Keath*, 63

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Mo. 88; *Douglass v. Orr*, 58 Mo. 575; *Schmieding v. Ewing*, 57 Mo. 83.

Kehr & Tittmann for respondent.

(1) The proceeding to set aside the sheriff's sale by motion was proper. *Hicks v. Perry*, 7 Mo. 346; *Clamorgan v. O'Fallon*, 10 Mo. 112; *Nelson v. Brown*, 23 Mo. 13; *Ray v. Stobbs*, 28 Mo. 35; *Parker v. Ry.*, 44 Mo. 415; *Malloy v. Batchelder*, 69 Mo. 503. (2) A motion to set aside an execution sale being a proceeding at law, the appellate court will not weigh the evidence. *Holden v. Vaughan*, 64 Mo. 588. (3) The levy was oppressive. *Silver v. McNeil*, 52 Mo. 518. (4) The levy was not in conformity with the statute, nor does it describe or identify the shares. *Foster v. Potter*, 37 Mo. 525; *Freeman on Executions*, §§ 348, 290. (4) The execution defendant having been misled by the assurance given his attorney by the deputy sheriff as to the hour of sale, and his property having been sacrificed in consequence of it, the sale should be set aside. *Rorer on Judicial Sales*, 1099; *State, etc., v. Moore*, 72 Mo. 285; *Parker v. Ry.*, 44 Mo. 415; *Stevenson v. Potter*, 45 Mo. 358. (5) If a sheriff can see that property is about to be sacrificed, he is not bound to accept a bid, but should delay or adjourn the sale. *Conway v. Nolte*, 11 Mo. 74; *Shaw v. Potter*, 50 Mo. 281; *Good v. Crow*, 51 Mo. 212; *Stowbridge v. Shaw*, 52 Mo. 21; *State, etc., v. Moore*, 72 Mo. 285. (6) The stock, consisting of three hundred and thirty-three shares, was sold *en masse*, whereas it should have been divided and sold separately or in parcels. *Rowley v. Brown*, 1 Bin. 62; *Rector v. Hart*, 8 Mo. 461; *Kelly v. Hurt*, 61 Mo. 463; *State, etc., v. Yancy*, 61 Mo. 331; *Bouldin v. Ewarts*, 63 Mo. 331. (7) The price bid is so grossly inadequate as to make it unconscionable to permit the sale to stand. *Nelson v. Brown*, 23 Mo. 13; *H. & St. Joe. Ry. v. Brown*, 43 Mo. 294; *Mechanics' Bk. v. Pitt*, 44 Mo. 364; *Parker v. Ry.*, 44 Mo. 415; *Mitchell v. Jones*, 50 Mo. 438.

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PER CURIAM.—The American Wine Company recovered judgment in the St. Louis circuit court against Scholer, on the fourteenth of November, 1881, for \$5,739.71. Execution was issued upon this judgment, by virtue of which the sheriff levied upon three hundred and thirty-three shares of stock in the American Wine Company, as the property of Scholer, and on January 4, 1882, sold the same to Cook for ten dollars per share. On the return day of the execution, the defendant therein filed a motion to set aside the sale, which was sustained by the court, and a *venditioni exponas* ordered. The plaintiff and Cook were duly notified of the motion to set aside the sale. They appealed from the order of the circuit court. The court of appeals affirmed the judgment, and they appealed to this court. The evidence shows that the sale took place at ten o'clock a. m.; that defendant's attorney had made inquiry at the sheriff's office, and was told by a deputy in charge of the office, that the sale would not take place until twelve o'clock, and that he could rely upon that.

Defendant desired to appeal from the judgment against him, and at ten o'clock on the day of sale went before the court, prepared to file his appeal bond, when he was notified the sale was then progressing. His attorney at once went out and found the sale had just been made. At ten o'clock a. m., Mr. Haeussler, in passing to the court room, found two deputy sheriffs selling the stock, when he remarked to them that it was not right to sell the stock at that hour, and that he was sure parties desired to be present who would not be there until twelve o'clock. He then passed on into the court house, and there met the sheriff and made substantially the same statement to the sheriff, coupled with a request to him to stop the sale. Within a few minutes, and before the sheriff received the money, and before he had taken any steps to transfer the stock, he was notified of what the deputy had said to the defendant's attorney. The deputy

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sheriff who cried the sale shows that the three hundred and thirty-three shares were sold in a lump, and that shares of stock were not usually sold at that hour. Other witnesses say there was a custom to sell at twelve o'clock, and others say there was no such custom, so that the matter of custom may be left out of the case. The stock so sold at ten dollars per share was valued at seventy-five to one hundred dollars per share.

The defendant was endeavoring to perfect his appeal from the judgment upon which the execution was issued, and under such circumstances had a right to know from the sheriff at what hour he would make the sale, and had a right to rely upon such information when he received it. It appears he did so, and as a result three hundred and thirty-three shares, worth, at least, \$20,000, were hastily sold in a lump for \$3,330. That the plaintiff was misled, and a large amount of property sacrificed, is clear enough. We do not conclude that the sheriff intended to bring about such a result, but it did come about, from his design to sell at ten o'clock, and the assurance of the deputy that the sale would not be made until noontime. That the sale, under such circumstances, ought not to stand, when, as here, a timely application is made to vacate it, is too clear to admit of much argument. The court had complete control over its own process, and was possessed of ample powers to set aside the sale. Certainly so at or before return term of the writ. *Ray v. Stobbs*, 28 Mo. 35; *Nelson v. Brown*, 23 Mo. 13; *Downing v. Still, Adm'r*, 43 Mo. 321.

Judgment affirmed.

Davis v. Ritchie.

DAVIS, *Appellant*, v. RITCHIE.

Practice: AMENDMENT: STRIKING OUT NAME OF CO-PLAINTIFF. An amendment by striking out the name of a co-plaintiff does not change the original cause of action, and is permissible under Revised Statutes, section 3060.

Appeal from Buchanan Circuit Court.—HON. W. H. SHERMAN, Judge.

REVERSED.

Jas. W. Boyd for appellant.

Moss & Shortridge for respondent.

PER CURIAM.—We reverse the judgment in this cause because the amendment, consisting as it did in striking out the name of Davis as co-plaintiff, was an amendment which did not change the original cause of action, in the smallest particular and was an amendment perfectly competent to make under the liberal provisions of section 3060, Revised Statutes, 1879. Therefore, judgment reversed and cause remanded.

Mansfield v. Allen.

MANSFIELD V. ALLEN *et al.*, Appellant.

Practice: PARTIES: JUDGMENT.—The Supreme Court may reverse a judgment as to some of the appellants, and affirm it as to others. R. S., secs. 3570, 3582, 3583.

Appeal from Buchanan Circuit Court.—HON. W. H. SHERMAN, Judge.

REVERSED.

A. H. Vories and *E. O. Hill* for appellants.

Jas. F. Pitt for respondent.

SHERWOOD, J.—In our opinion, Allen was improperly made a party defendant, but this ought not to authorize a reversal of the judgment, under the liberal provisions of our statute respecting practice in civil cases. Sections 3570, 3582, 3583. See, also, *Wescott v. Bridwell*, 40 Mo. 146; *City, etc., v. Bressler*, 56 Mo. 350. We, therefore, modify the judgment by reversing it as to Allen, and affirming it as to Bassett. Norton and Ray, JJ., concur.

HENRY, C. J., CONCURRING.—I concur in reversing the judgment, but think that the cause should be remanded for a re-trial thereof.

Townsend v. The Chas. H. Heer Dry Goods Company.

TOWNSEND V. THE CHAS. H. HEER DRY GOODS COMPANY,
Appellant.

1. **Note: PRESENTMENT FOR PAYMENT.** Where a note is payable at no particular place and is presented for payment to the maker in person, the place of the presentation is immaterial.
2. ———: ———: **INDORSER.** Where a note is payable at a particular place, it must be presented there to render an indorser liable.
3. ———: **NOTICE OF DISHONOR.** A variance which is not misleading, between the notice of dishonor and the note, will not affect the sufficiency of the notice.
4. **Negotiable Note, Action on: PLEADING.** A petition in an action against an indorser on a negotiable promissory note must state facts from which it may appear to the court that the note was a negotiable one.

Appeal from Greene Circuit Court.—HON. W. F. GEIGER,
 Judge.

REVERSED.

Francis H. Sheppard for appellant.

(1) Proof of demand at the place stated in the note is essential as between endorsee suing and endorser sued. 1 Danl. Neg. Ins., 478; Parsons on Notes and Bills, 431; *Glasgow v. Pratt*, 8 Mo. 336; *Faulkner v. Faulkner*, 73 Mo. 327; *Sebree v. Doer*, 9 Wheat. 558. Mere knowledge is not notice. 7 Danl. Neg. Ins. 29.

(2) Any indorser may give notice to any prior indorser, provided his own liability has been fixed by a correct notice, or if he has paid the note in the hands of a subsequent holder. But a voluntary payment in such case is equivalent to a gift, and does not put the endorser so paying on ground from which he can notify prior endorsers. 2 Danl. Neg. Inst. (1 Ed.) secs. 988, 989, pp. 42 and 43 and cases cited. (3) If the petition does not show that the

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paper sued on was payable to order or to bearer, a consideration must be pleaded, or else no cause of action is stated. R. S., sec. 663, p. 107. (4) When a corporation is sued on its written contract, made in its corporate name, it is estopped to deny its corporate existence; yet such estoppel does not excuse the pleader from setting up the incorporation together with the accompanying facts. On the contrary the estoppel depends upon the averments. Bliss Code Pl. (1 Ed.) sec. 254, p. 303, sec. 259, p. 307, sec. 260, p. 308; 25 Mo. 17; 60 Mo. 252; 62 Mo. 247; and 70 Mo. 471, are all suits by corporations, in which incorporation was pleaded. See *Jones v. Tuller*, 38 Mo. 66. In the present case the corporation is defendant. (5) The words "order" and "value received" are all essential in Missouri when declaring on negotiable paper, and if omitted the pleading shows no cause of action on negotiable paper. R. S., sec. 547, p. 85, sec. 548, p. 86; 1 Daniel Neg. Ins. (1 Ed.) p. 85, sec. 108, note 1; *Jaccard v. Anderson*, 32 Mo. 188; *Lindsay v. Parsons*, 34 Mo. 422; *Simmons v. Bell*, 35 Mo. 464; *Stilwell v. Craig*, 58 Mo. 30; *Bailey v. Smock*, 61 Mo. 218, 219; *Stix v. Matthews*, 63 Mo. 371; *Bateson v. Clark*, 37 Mo. 31, is overruled by *Bailey v. Smock*, 61 Mo. 218, 219, but even if not, the petition does not contain the word "negotiable" or its equivalent. (6) In an action against the assignor of non-negotiable paper, the pleader must aver that the maker was sued at the first term of court at which suit could have been brought, or else must show a legal excuse for not suing. Lacking these averments, the petition contains no cause of action on non-negotiable paper. R. S., p. 107, sec. 665; *Jaccard v. Anderson*, 32 Mo. 188; *Simmons v. Bell*, 35 Mo. 465; *Bailey v. Smock*, 61 Mo. 219; (7) Exhibits form no part of the petition. *Chambers v. Carthel*, 35 Mo. 374; *Dyer v. Krager*, 37 Mo. 603; *Deitz v. Corwin*, 35 Mo. 376; *Curry v. Lackey*, 35 Mo. 390; *Peake v. Bell*, 65 Mo. 224; *Baker v. Berry*, 37 Mo. 306; *Phillips v. Evans*, 64 Mo. 17.

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J. R. Vaughan and *S. H. Boyd* for respondent.

(1) The presentment for payment of the note sued on to the maker was properly made and proven. 2 Daniel Neg. Ins. 567; *King v. Crowell*, 61 Me. 244; 1 Parsons on Notes and Bills, 421. (2) The mere fact of giving notice to a person implies that the latter is looked to for payment. 4 Cent. L. J. 267; Story on Notes, sec. 353; 2 Daniel Neg. Ins., sec. 985. (3) The notice may be verbal. *Glasgow v. Prattle*, 8 Mo. 336; *Linville v. Welch*, 29 Mo. 203. (4) An immaterial variance in the description of the note, or any kind of misdescription, unless the same be misleading, will not vitiate the notice. *McCune v. Bell*, 38 Mo. 281; 2 Daniel Neg. Ins., secs. 979 and 980. (5) An agent of the holder or a party to the paper dishonored can give notice of such dishonor. *Bk. v. Vaughan*, 36 Mo. 90; 4 Cent. Law Jour. 267. (6) An endorser can give such notice to any prior endorsers. Story on Notes, 83 c., 302; *Glasgow v. Prattle*, 8 Mo. 336; *Stix v. Mathews*, 63 Mo. 371; *Griffith v. Assman*, 48 Mo. 66. (7) The instrument sued on imports a consideration, and hence the latter need not be averred. *Taylor v. Newman*, 77 Mo. 257. (8) A corporation may in general be declared against by what purports to be a corporation name without alleging it to be incorporated or setting forth how it acquired that name, and by appearing and filing an answer and other papers in its corporate name; by giving an appeal bond in its corporate name, and affixing its corporate seal, it admits its corporate charter and is estopped from denying it. *Seaton v. Chicago, R. I. & P. R. R. Co.*, 55 Mo. 416; *Smith et al. v. Burlington & Mo. R. R. Co.*, 55 Mo. 526; *Willhouse v. Atl. & Pac. R. R. Co.*, 64 Mo. 523; *Hudson v. St. L., K. C. & N. R. R. Co.*, 53 Mo. 525; Boone on Corporations, sec. 153, p. 227.

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Per CURIAM.—This was a suit on the following note :

“\$187.28. SPRINGFIELD, Mo., Oct. 3, 1881.

“Sixty days after date I promise to pay to the order of Chas. H. Heer Dry Goods Company One Hundred, Eighty-Seven and 28-100 dollars at my office in Seligman, Mo., value received.

“(Signed) W. G. NEELY.”

“(Endorsed.) Pay to the order of L. S. Moor.

“CHAS. H. HEER DRY GOODS CO.

“By Chas. H. Heer, Jr., Secretary and Treasurer.

“L. S. MOOR.”

The petition is as follows :

“Plaintiff states that on the the third day of October, 1881, the defendant W. G. Neely made and delivered to the said Chas. H. Heer Dry Goods Company his promissory note in the sum of \$187.28, which is herewith filed, payable at the office of said defendant Neely, in Seligman, Mo., in sixty days after date, and dated October 3, 1881, and that subsequently the said Chas. H. Heer Dry Goods Company endorsed the said note and delivered the same to one L. S. Moor, and that the said L. S. Moor delivered and endorsed the same to the plaintiff. That when the said note became due, said plaintiff had the same duly presented for payment at the office of said Neely in Seligman, Mo., and the same not being paid, notice of non-payment and of such demand was duly given to said dry goods company and the said Moor. That said sum of \$187.28, with interest at the rate of six per cent. per annum from December 5, 1881, and also four per cent. on the said sum due on said note and charges on account of protest in the sum of \$2.50 are due the plaintiff and for which said plaintiff asks judgment.”

The dry goods company alone answered, and is alone the appellant. Its answer was a general denial. There was judgment for the plaintiff, from which the defendant appealed to this court.

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The evidence clearly tended to prove that the transfers of the note were genuine and all before maturity; that when due it was presented by the witness Wilkerson to Neely the maker, for payment, "at Neely's place of business or thereabouts. I am not certain whether it was in his store, or at the door of it, or somewhere in the vicinity." Neely did not pay, but said the note was presented, but he was unable to pay. The witness Wilkerson's testimony then clearly tended to show that he personally gave written notice to Neely and Moor, and sent also by mail copies of the notice to the dry goods company and to Townsend and the First National Bank.

The defendant then read in evidence the notice received by it, as follows:

"SELIGMAN, Mo., December 5, 1881.

"To the First National Bank, Springfield, Mo.:

"Please take notice that one promissory note, drawn by W. G. Neely in favor of C. H. Heer Dry Goods Company, dated on the third day of October, 1881, and due December 5, 1881, payable at his office in Seligman, endorsed by C. H. Heer, L. S. Moor, W. H. A. Townsend, and R. L. McElhany, for One hundred, Eighty-Seven and 28-100 Dollars, the said note having been presented at the request of Adams Express Company, the holder, to W. G. Neely at his office in Seligman, Mo., and payment thereof demanded and refused, is protested for non-payment, and that the holder looks to you for payment thereof and for damages, expenses," etc.

Upon the application of plaintiff the court gave the following instructions which were objected to by the defendant company: "That in the notice of dishonor of a promissory note, an unintentional variance in the description of the note will not vitiate the notice, if under all the circumstances of the case the notice is not misleading and identifies the note with reasonable certainty."

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"That an endorser of a promissory note is a proper and competent person to give notice to any prior endorser of a demand, and the dishonor of payment of a promissory note."

The following declarations asked by the defendant company were refused :

"The court declares the law to be that to recover upon a negotiable promissory note against the endorser, the holder suing must prove a demand of payment at the place designated in the note for payment. That plaintiff has failed to show such demand in this case and can not recover."

"That to recover against the endorser of negotiable paper, the holder must show a legal notice to such endorser. That in this case the only written notice in evidence to the defendant endorser informs him that the holder looks to the First National Bank for payment, damages, and costs, and that though such a document may convey knowledge, it will not impart notice, and on such notice plaintiff cannot recover."

I. When a note payable at no designated place is presented personally to the maker, and payment refused, the place is not material. Especially if no objection as to place is made by the maker. 1 Danl. Neg. Ins., secs. 638, 643; *King v. Crowell*, 61 Mo. 244. But the liability of an endorser of a bill or note made payable at a particular place, is dependent upon a different rule. In such case the presentment must be at the place named in the note. 1 Danl. Neg. Ins., sec. 644. In the case at bar the evidence tended strongly to show that the presentation was at the specified place, and the court sitting as a jury so found ; that finding we will not disturb.

II. The notice was, we think, sufficient. 2 Danl. Neg. Ins. sec., 985; Story on Prom. Notes, sec. 353. There is no misleading variance between the note and notice. 2 Danl. Neg. Ins., secs. 979, 980. And there is nothing in the fact that the notice was given, and the note presented

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for payment by a justice of the peace. There can be no doubt that a notice from the agent of the holder or endorser will be sufficient. 4 Cent. L. J. 267; *Bk. Mo. v. Vaughan*, 36 Mo. 91.

III. It is insisted by the appellant that the petition does not state facts sufficient to constitute a cause of action, in that it does not aver that the instrument sued on is a negotiable promissory note; or rather the petition does not state the necessary facts from which it appears to the court that it is a negotiable note. The note itself was filed with the petition, and was read in evidence and is payable to the order of the payee, and expresses on its face to be for value received; and under the statute, (sec. 547, R. S.) is a negotiable note. The petition nowhere alleges that the instrument sued on was made payable to the payee or order, nor does it state that it was for value received, nor does it even state that it was a negotiable promissory note; but only that Neely made his "promissory note," payable, etc.

In *Jaccard v. Anderson*, 32 Mo. 183, the petition averred "that Washington King, by his negotiable note herewith filed, dated April 16, 1856, promised to pay to defendant or his order," etc. The court say: "The operative words in a negotiable note under the law of this state are 'for value received, negotiable and payable without defalcation,' and their employment in the instrument declared upon must appear in the petition in order to enable the court to see and pronounce the legal effect of such instrument." In *Bateson v. Clark et al.*, 37 Mo. 31, the petition was that "defendant made his negotiable promissory note in writing * * * by which he promised to pay to the order of defendants, two thousand dollars for value received," which was held sufficient as stating the negotiable quality of the note then sued on. In the case at bar, there is no approach to an allegation of facts showing the note to be negotiable. This seems not to be sufficient. *Parsons on Notes and Bills*, 474.

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The doctrine announced in 32 Mo., *supra*, is reaffirmed in *Lindsay v. Parsons*, 34 Mo. 422; *Simmons v. Belt et al.*, 35 Mo. 461, and in the light of these authorities the petition in this case is not sufficient.

IV. The instructions given for the plaintiff we think very correctly stated the law, and fairly presented the questions to the jury. The instructions refused, as prayed by the defendant, were properly refused, because to have given them would have taken the questions of fact from the jury. It was for the jury to say from the evidence whether demand had been made. The judgment of the circuit court is reversed and the cause remanded for the defect in the petition.

COCKRELL V. THOMPSON, *Appellant*.

1. **Partnership: FIRM DEBT: ACTION AGAINST FORMER PARTNER.** It is a good defence to an action by one against his former partner for the latter's share of a firm debt paid by the former that the firm creditor was, on his part, indebted to plaintiff and defendant jointly, and that plaintiff, with knowledge of the existence of such indebtedness and against defendant's consent, paid the firm creditor.
2. ———: ———. It is, also, a good defence to such action that the firm indebtedness originated from partnership transactions between plaintiff and defendant, and at the commencement of plaintiff's action there remained unsettled of the partnership business other matters than the item of indebtedness paid by plaintiff.
3. ———: ———. It is no defence to such action that at the time plaintiff paid the firm debt, the firm creditor was indebted to defendant individually and that plaintiff knew of such fact and, nevertheless, and against defendant's consent paid the firm debt.
4. **Wagering Contracts, What Are.** Where in a contract for the sale of wheat, it is the mutual understanding and intention of the parties that the transaction shall be closed by a settlement of

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differences in the value of the article sold according to the fluctuations of the market and not by its delivery, such contract is one of wager and is void as being against public policy.

5. ———. Where, however, it does not appear that it was the intention of both of the contracting parties to so settle according to the fluctuations of the market, the contract will be upheld.

Appeal from Johnson Circuit Court.—HON. N. M. GIVAN, Judge

AFFIRMED.

J. M. Crutchfield for appellant.

(1) A payment, to be the foundation of a claim for contribution, must be compulsory, that is, there must be a fixed and positive obligation to pay. *Pitt v. Purssord*, 8 Mees. & W. 530; *Davis v. Humphreys*, 6 Mees. & W. 153; *Lucus v. Jeffson Ins. Co.*, 6 Cow. 635; 2 Wait's Action and Def. 289; *Frith v. Sprague*, 14 Mass. 455. (2) A broker cannot recover money advanced to pay losses incurred in a gambling operation, nor commission for his services therein. *Fareira v. Gabell*, 89 Pa. St. 89. (3) In an action to recover for losses and commission by one dealing in grain as agent for another, if it was the intention merely to settle the difference without any actual delivery, there can be no recovery. *Kolderwood v. McCree*, 11 Ill. App. 543; (4) A note given by a principal to his broker for services rendered, and money advanced in making and settling gambling grain contracts, is void. *Barnard v. Backhaus*, 52 Wis. 593 (9 N. W. Rep. 595); *Cunningham v. National Bank*, 17 Central Law Journal, 470. (5) In option deals the broker stands in no better position to recover differences than the seller. *In Re Green*, 7 Biss. 338; *Cobb v. Prell*, 15 Fed. Rep. 774. (6) Contracts to purchase or sell without the intention to deliver, but merely to settle according to the state of the market at

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the maturity of the contract by paying differences, are void. *Ramsey v. Berry*, 65 Me. 570; *Story v. Solomon*, 71 N. Y. 520; *Smith v. Thomas*, 97 Pa. St. 278; 13 Cent. Law Journal, 35; *Grizelwood v. Blane*, 2 J. Scott, 11 C. B. (Eng. C. L.) 525; *Bruas Appeal*, 5 P. F. Smith, 299; *Tony v. Foot*, 95 Ill. 99; *Wyman v. Fisk*, 3 Ill. 238; *Ex parte Young*, 6 Biss. 53; 16 Cent. Law Journal, 225; *Pickering v. Cease*, 79 Ill. 328; *Lyon v. Culbertson*, 25 Am. Rep. 349; *Lyon v. Culbertson*, 83 Ill. 33; *Rourk v. Short*, 34 Eng. L. and Eq. 219; *Cassort v. Hinman*, 1 Bos. 207; *Biglow v. Benedict*, 70 N. Y. 70; *Evringham v. Meigham*, 15 Cent. Law Journal, 332; *Rudolf v. Winters*, 7 Nev. 125; *Kent v. Miltenberger*, 13 Mo. App. 508; *Killpatrick v. Bonsall*, 72 Pa. St. 155; *Yerks v. Solomon*, 18 N. Y. Sup. Ct. (11 Hun) 473; Article in 16 Central Law Journal, 225, and authorities there cited; *Gregory v. Wendell*, 38 Mich. 337; 33 Am. Rep. 390. (7) One of two joint defendants may plead by way of set-off a demand due him from the plaintiff. *Kent v. Rogers*, 24 Mo. 306. (8) One partner cannot maintain an action at law against the other for a payment made on account of a partnership liability until after a dissolution and settlement. Story on Partnership (4 Ed.) sec. 221, p. 354; *Smith v. Smith*, 33 Mo. 557; *Moran v. Martin*, 25 Mo. 360; *Burns v. Nottingham*, 60 Ill. 531. (9) In an action for money paid, defendant may show that he expressly notified the plaintiff not to pay the claim, and if he pays it against such notice, he cannot recover the amount as for money paid at defendant's request or to his use. 4 Wait's Action & Defences, page 460 and 467, section 1, and cases cited; *Barnum v. Lithauer*, 1 Abb. Ct. App. (N. Y.) 99; 4 Keyes, 317. (10) In an action for money paid, where there is no express request to pay it, the plaintiff must allege and prove a state of facts from which the law will imply a request and the requisite promise. 4 Wait's Action and Defences, 450 and 453; R. S. 1879, p. 60, sec. 3511.

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S. P. Sparks for respondent.

(1) The petition states a cause of action. It alleges that plaintiff and defendant jointly bought and sold wheat, etc., that the transactions resulted in a loss; that it was done through their agents and that plaintiff paid the loss to the agents. (2) The answer does not charge that the transactions mentioned in it were gaming contracts. In order that a contract be illegal because a gambling one, it must be the intention of both parties that it be settled by the payment of differences. *Lehman v. Strasburger*, 3 Cent. Law Jour. 134; *Gregory v. Wendell*, 40 Mich. 432. The second instruction given for plaintiff correctly declares the law. *Buckner v. Ries*, 34 Mo. 357.

PER CURIAM.—John J. Cockrell sued Waddy Thompson for \$681.25, and interest from date of demand. In his petition he charged that on October 3, 1881, he and defendant jointly purchased, in open market in Toledo, Ohio, ten thousand bushels of number two red winter wheat, to be delivered at any time during November of said year, in elevator in said city, at the price of \$1.51 $\frac{3}{4}$ per bushel; that on October 3, 1881, they jointly sold in open market in St. Louis, Mo., ten thousand bushels of wheat of the same grade at \$1.55 per bushel, to be delivered in elevators in said city any time in December, 1881; that on October 17, 1881, they jointly bought in open market in St. Louis ten thousand bushels of wheat, to be delivered in elevators in said city at any time in December, 1881, at the price of \$1.52 $\frac{1}{4}$ per bushel for five thousand bushels, and \$1.52 $\frac{3}{4}$ per bushel for five thousand bushels; that on or about October 29, 1881, they jointly sold in open market in Toledo, ten thousand bushels of wheat, to be delivered in elevators of said city, any time in November, 1881, at \$1.36 $\frac{1}{4}$.

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per bushel. That the said business was done through their factors and commission merchants, Cole Brothers, of St. Louis. That the net losses of plaintiff and defendant in said transactions amounted to \$1,300.00, and the commissions of Cole Brothers amounted to \$62.50. That plaintiff paid the \$1362.50 to said Cole Brothers, commission merchants, and that defendant is liable for, and should pay plaintiff half that sum, which payment was demanded and refused, etc.

The answer denied knowledge or information, as to whether or not plaintiff paid the \$1362.50. It further denied that plaintiff and defendant were indebted to Cole Brothers; alleged that Cole Brothers were liable to plaintiff and defendant in a large amount, and also liable in a large amount to defendant individually, and that plaintiff and defendant jointly, and defendant individually, had good defences to any action that Cole Brothers could have brought against them, or either of them, which plaintiff well knew, and that defendant is not liable to plaintiff. The answer further alleged that plaintiff and defendant were partners, under the firm name and style of Cockrell & Thompson, for the purpose of dealing in "options," and that they had so dealt largely, and that the business of the partnership was unsettled, and, therefore, the action ought not to be maintained.

Another defence was "that the wheat alleged in the petition to have been purchased and sold by plaintiff and defendant, was never delivered to them, or by them to any one else, but that the same was contracted for by them through said Cole Brothers, with the understanding and intention of said plaintiff and defendant, and the said Cole Brothers, that none of said wheat, and no part thereof, was ever to be delivered to, or accepted by these parties, or to be delivered by them to any one else, but that they were merely to adjust and pay the differences in the market value thereof, according to the rise and fall of the market, and that, therefore, if said Cole

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Brothers had, or pretended to have, any claim or demand against the plaintiff or defendant, on account of the alleged purchase and sale of said wheat, the said claim was based upon a transaction that was contrary to public policy, and was illegal and void," and that Cockrell knew this, and that defendant had other good and valid defences against such claim, and Cockrell would not allow the use of his name in making a defence, or give the defendant the opportunity to make it, but was the attorney of Cole Brothers, in a suit defendant had brought against them in the St. Louis circuit court, etc. The reply was a general denial.

On the trial by the court, sitting as a jury, plaintiff was, against defendant's objection, permitted to amend his petition by interlineation of the words, "to said Cole Brothers, commission merchants," so as to allege a payment to Cole Brothers of the \$1,300 as well as the \$62.50, the petition not before showing to whom the \$1,300 was paid. The evidence is not preserved in the record, but it is said that the parties introduced evidence, the plaintiff's tending to prove the allegations of the petition, and defendant's tending to prove the allegations of the answer; and then plaintiff introduced evidence in rebuttal. Plaintiff recovered judgment and defendant appealed.

I. The defendant objected to the introduction of any evidence, on the ground that the petition stated no cause of action. The plaintiff then asked and obtained leave to amend by interlineation, as before stated. Defendant objected to the amendment, and when it was allowed over his objection, asked for a continuance, because the amendment made a material alteration in the petition, and he had no opportunity to answer and defend against the same. The court refused the continuance, and in its action in those particulars we find no error.

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II. We do not concur in defendant's conclusion that the petition states no cause of action.

III. For plaintiff the court in effect declared that he could recover as he prayed, if he paid Cole Brothers the \$1,362.50 on the transactions stated in the petition, unless Cole Brothers were indebted to plaintiff and defendant jointly and plaintiff had knowledge of such indebtedness at the time of his said payment, or, unless said indebtedness to Cole Brothers grew out of partnership transactions between plaintiff and defendant, and at the commencement of the action there remained unsettled of the partnership business other matters than the single item of the amount paid Cole Brothers. And for defendant the court declared there could be no recovery unless plaintiff and defendant were jointly indebted to Cole Brothers at the date of payment, and such indebtedness was then due and founded upon a legal and valid contract; nor if Cole Brothers were indebted or liable to plaintiff and defendant jointly, and plaintiff was informed of such fact and wouldn't join defendant in a suit against Cole Brothers therefor, and if plaintiff paid the claim of Cole Brothers over the objection and against the consent of defendant. Of these declarations defendant has no reason to complain.

IV. Defendant finds error in the refusal of a declaration of law to the effect that plaintiff could not recover if, when the payment to Cole Brothers was made, Cole Brothers were indebted to defendant, individually, in a sum equal to their demand, and plaintiff, knowing said fact, paid Cole Brothers against the consent and over the objection of defendant. This is not true as a proposition of law, and there are no special facts under which it ought to be the law of this case.

V. If nothing of the partnership transactions of plaintiff and defendant remained unsettled at the beginning of this suit, saving only the item of payment to

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Cole Brothers, upon which suit is brought, this action might be maintained, as the court properly declared.

VI. For the plaintiff the court declared, in substance, that to render the alleged purchases and sales void, as being against public policy, it is necessary that it should have been the intention of both the sellers and the buyers that no grain should be delivered or received, but that the settlements should be on "margins" or differences; and that if such was not the intention of both parties, a recovery cannot be defeated, although plaintiff and defendant, as one party to the contracts, may never have actually delivered or received any grain, but settled through their agents, by transferring their rights to other parties, or settled or rescinded the contracts by paying or receiving money as losses or gains.

The following declaration, asked by defendant, was refused: "If the court finds from the evidence that the plaintiff and defendant employed the said Cole Brothers as factors and commission merchants, to contract for the purchase and sale of the wheat mentioned in the petition, to be delivered to or by them at a future time, and that none of said wheat was ever delivered or accepted, and that neither plaintiff, defendant, nor said Cole Brothers, at the time of making any of said contracts, intended to deliver or accept said wheat, or any part thereof, but merely to pay or collect the differences in the market value thereof, according to the rise and fall of the market, and that the same was so settled, and that the alleged claim of said Cole Brothers against plaintiff and defendant grew out of a loss sustained by them on the purchase and sale of said wheat, as above stated, then plaintiff cannot recover for any part of said loss he may have paid to said Cole Brothers without the consent of the defendant."

Plaintiff's declarations rest on the proposition that to vitiate the contract, *both* parties to it must have intended that it should be in its nature a wagering contract. The

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declaration asked by defendant, regards the understanding upon the one side, between the principals and the agents, and a final adjustment in accordance with such understanding, sufficient to bar a recovery in this case, no matter what contracts the agents were authorized to make or did make.

The validity of the contract is to be determined from the intention of the parties to it, whatever, or however, unobjectionable its form. If the contract be sufficient in form, and one of the contracting parties intend to pay for and receive or deliver, and be paid for the property in form contracted about, as the case may be, the contract is valid and binding, although the other party to it intend to gamble on the price of the commodity and to settle on "differences" only. And if a party, actuated by the spirit of the gambler, authorizes his agent to buy or sell an article for him as a trader, and the agent does so, at the same time knowing that his principal does not mean to receive or deliver the commodity, as the case may be, but means, when the proper time comes, to settle the business by paying losses or receiving gains, according to the fluctuations of the market, still the contract is valid and binding, unless the other party also made it as, or understood it to be, a wagering arrangement, a good contract in form, but, in fact, a mere wager upon the future state of the market. And if the agent is authorized to, and does, make a valid contract of sale or purchase for his principal, which, however, he knows the principal means to close as a mere wagering venture on the fluctuations of the market, and if by direction of the principal he afterwards does close the transaction by the payment of losses, there is no legal impediment in the way to a recovery by him of the amount so paid, with a usual and reasonable allowance for services rendered in the transaction. *Lehman v. Strassburger*, 2 Wood, 562; *Warren v. Hewitt*, 45 Ga. 508; *Kent v. Milltenberger*, 13 Mo. App. 510; *Michael*

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v. Bacon, 49 Mo. 474; *Williamson v. Baley*, 78 Mo. 637.

The declaration asked by defendant assumes that Cockrell & Thompson authorized Cole Brothers to buy and sell wheat for them. There is no charge in the answer that Cole Brothers did not actually make for them valid contracts for the purchase and for the sale of wheat. There is no charge that any seller or buyer, who dealt with Cockrell & Thompson through Cole Brothers, did not on his part, in good faith, buy, intending to pay for and receive the wheat bought, or sell, expecting to deliver and be paid for the wheat sold. So this declaration was properly refused. And while there is not harmony in the decisions respecting the validity of contracts of sale of articles not at the time possessed or owned by the seller, to be delivered in the future, the weight of authority, and, I think, of reason as well, upholds such contracts when made in good faith and not as masks for gambling ventures. Present ownership is of less consequence than the *intention* of the contracting parties. And the law of the case is the same, whether a specific something then actually owned by one of the parties and in view is the subject of the sham sale and purchase, or whether the subject is not identified, a thing of its kind and grade merely, if the mutual understanding or intention of the parties is, that the transaction shall be closed by a settlement of differences, according to the fluctuations of the market, and that the contract shall not in good faith be one of sale and purchase, considerations of public policy render void the gambling arrangement.

So, it is equally immaterial that a specified, identified article is to be actually sold by one of the parties, or by another, at a future day, fixed or optional, or contingent, and a settlement made according to the wager, by the payment of the difference between a stipulated sum, price, or valuation, and that for which the article

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shall have been sold. If, by the agreement, understanding or intention of the parties, what seems to be a contract of bargain and sale, is really only a wager of the kind under consideration, then no matter what may be the standard by which the result of the wager is to be ascertained, the vicious contract cannot be the foundation of a recovery in an action where its true character is made to appear. For a contract, whatever its form, which, by the agreement, understanding, or intention of the parties making it, is to be closed, not by the delivery and receipt in good faith of a commodity actually bought and sold, but by the payment by one party of an account equal to the increase in the value of the commodity, as ascertained by a comparison of its market price at one time, or of a fixed arbitrary valuation placed upon it, with its market value, or the price for which it may, or shall, be sold, at a different time, or place, fixed, optional, or contingent, in consideration that the other party shall pay an amount equal to the decrease in the price, value, or valuation of the commodity, whether a specified, identified thing, or unsettled, unseen, and known only as a thing of its species, or class, and grade, is void as a gambling contract. *Sawyer v. Taggart*, 14 Bush, 727.

Although we may have a suspicion that those from whom Cockrell & Thompson, through their "factors and commission merchants," "bought" grain, and those to whom, through the same agency, they "sold" grain, were like the answer says they were, dealers in "options," and the transactions those of grain gamblers, yet it is not so pleaded or proved, and we cannot *presume* the contracts to have been under the ban of the law. *Jackson v. Foote*, 12 Fed. Rep. 37; *Gregory v. Wallowa*, 58 Ia. 712; *Pixley v. Boynton*, 79 Ill. 352; *Ormes v. Dauchy*, 82 N. Y. 448.

The judgment is affirmed.

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PRIEST V. THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellant.

Appeals from Justices, When Triable : PRACTICE. Where on an appeal to the circuit court from a justice of the peace the appellant fails to give notice of the appeal and the appellee enters his appearance on or before the second day of the term the latter is not then entitled to a simple affirmance of the judgment. If he desires a determination of the cause at that term, he must offer evidence and try the case *de novo*.

Appeal from Monroe Circuit Court.—HON. THEODORE
BRACE, Judge.

REVERSED.

Smith & Krauthoff and *Thos. J. Portis* for appellant.

The judgment of the court below is erroneous upon its face. Even if it can be presumed that the plaintiff entered his appearance on or before the second day of the first term after the taking of the appeal (although there is nothing showing this fact), this only entitled him to have the case tried at such term, or to have it continued at the cost of the appellant. R. S., sec. 3056. He was only entitled to have the judgment of the justice affirmed in case the appellant failed to give the required notice of the appeal at least ten days before the second term. R. S., sec. 3057. The statute does not make a failure to give notice ten days before the first term cause for an affirmance. The failure must be a continued one until ten days before the second term. "A judgment of affirmance for want of prosecution cannot be taken at the return term of the appeal," said this court in *Nay v. Han. & St. Jo. Railroad*, 51 Mo. 575, 577; *Riddle v. Gillespie*, 67 Mo. 627, 629. It may be true, that the

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plaintiff had a right to a trial at that term (assuming that he appeared on or before its second day), but this right did not entitle him to an affirmance, nor to a judgment without having proved his case. The judgment of the circuit court shows that it was rendered pursuant to and upon a motion by plaintiff to affirm that of the justice, and excludes the theory that it was a judgment by default, which could only be rendered upon evidence. And the idea that evidence was introduced to sustain the allegations of the plaintiff's statement is expressly negatived. The judgment was rendered upon the motion to affirm as indicated, and there was no writ of inquiry nor proof of the damages as required by law. *Snider v. St. L., I. M. & S. Railroad*, 73 Mo. 465, 469.

A. M. Alexander for respondent.

The record shows that the appellee entered his appearance on the twenty-fifth day of October, 1881. The term of the court commenced by law on the twenty-fourth day of October, 1881. So that there can be no question that the appearance of the appellee was entered on the second day of the term. The appellee having entered his appearance on or before the second day of the term, the cause stood for trial at that term of court. R. S., sec. 3056. After the appearance of the appellee in proper time the cause, so far as a trial was concerned, stood in the same condition that it would at any subsequent term of the court, and the appellant then making default and the circuit court being a court of general jurisdiction had the power to affirm the judgment of the justice.

BLACK, J.—This suit was instituted before a justice of the peace. Judgment was rendered by default on July 9, 1881. Subsequently, defendant filed a motion to set aside the judgment, which motion was overruled, and on July 22, the defendant appealed to the

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circuit court. More than ten days intervened between that appeal and the commencement of the next term of the circuit court, the October term, 1881. On October 24, 1881, appellee entered his appearance in the circuit court, the appellant having failed to give any notice of the appeal. On the next day appellant moved to dismiss the suit, which motion was overruled and on October 26, the cause was called for hearing and the defendant failing to appear the judgment of the justice was affirmed. The defendant then appealed to this court.

1. The point made here by the appellant, that the appellee did not enter his appearance on or before the second day of the term of the circuit court, is not well taken, for by law that term commenced on the fourth Monday of October, 1881. The appellee entered his appearance on the twenty-fourth day of the month and hence on the first day of that term.

2. The appellee having thus entered his appearance on or before the second day of the return term, was, according to the plain letter of the statute, entitled to have the cause tried at that term, or continued to the next term at his election. The majority of the court hold that he could not have the judgment affirmed at that term, it being the first term after the appeal was taken, but if he desired to dispose of the case at that term he should have offered evidence and proved up his case, that he could only have a trial *de novo*, not an affirmance, and the following authorities are relied upon, either as asserting that proposition, or as giving support to it; *Berry v. Union Trust Co.*, 75 Mo. 430; *Snider v. Railroad Co.*, 73 Mo. 465; *Page v. Railroad Co.*, 61 Mo. 78; *Blake v. Downey*, 51 Mo. 437; *Nay et al. v. Railroad Co.*, 51 Mo. 575; *Dooley v. Railroad*, 83 Mo. 103.

3. I dissent from this exposition of the law and maintain that the cause being ready for trial, and the

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appellant failing to appear, the appellee was entitled to a judgment of affirmance. The statute does, it is true, provide that the cause shall be tried anew in the circuit court, but it also provides that to procure an appeal, the appellant must enter into a recognizance conditioned "that the appellant will prosecute his appeal with due diligence to a decision, and that if, on such appeal, the judgment of the justice be affirmed, or upon a trial anew," etc., that if the judgment be affirmed, such judgment shall be against the appellant and his sureties. Secs. 3040, 3052, 3062, R. S. Now, prior to the revision of 1879, there was no provision in the act with respect to appeals from justices of the peace, which determined in what cases there might be an affirmance of the judgment, though, as we have seen, such a judgment was recognized in several of its provisions. The new section adopted in 1879 (sec. 3057), is: "If the appellant shall fail to give such notice (the notice of appeal) at least ten days before the second term of the appellate court after the appeal is taken, the judgment shall be affirmed or the appeal dismissed, at the option of the appellee." This statute but declares what the court had before that time repeatedly held. 50 Mo. 403; 51 Mo. 579; 63 Mo. 393; 67 Mo. 628. The difference only is, that by this section, the first term or the one which comes on first after the appeal, and by the decisions the first term was the one which came on ten days after the appeal was taken. It seems to be considered this section of 1879 now determines the cases in which alone there can be an affirmance; this is doubtless due to the fact that section 1,000 has been overlooked. That section provides: "In all cases where an appeal from a judgment of * * * a justice of the peace shall not be prosecuted by the appellant according to law, the judgment shall be affirmed and the costs adjudged accordingly." This section, has been a part of the statute law with respect to costs from an early day. It supplied any apparent omission in the

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statute with respect to appeals, and declares there shall be an affirmance in all cases where there is a failure to prosecute the appeal. The decisions last cited are all based upon the ground that by a continued failure to give the notice there was a failure to prosecute the appeal, and hence an affirmance was proper.

In *Martin v. White*, 11 Mo. 214, White recovered a judgment against Martin before a justice of the peace. Martin appealed, and when the cause was called he failed to appear, and the judgment of the justice was affirmed. The court then said the right of the appellant to have the cause tried anew must be understood as qualified by this section concerning costs, and he was only entitled to a trial anew when not in default. This case was affirmed in *Starr v. Stewart*, 18 Mo. 410; *Milligan v. Dunn*, 19 Mo. 643; *State v. Thevenin*, 19 Mo. 237. In *Nay v. Railroad Co.*, 51 Mo. 575, the defendant appealed subsequent to the rendition of the judgment of the justice and failed to give any notice. There was no appearance by the plaintiff, appellee, until the eighth day of the return term, and hence the cause did not stand for any action at that term. A judgment of affirmance then entered was held to be erroneous, but it clearly enough appears that Judge Adams understood the appellee might have a judgment of affirmance at the next term for want of prosecution, should the appellant then fail to appear.

From all this, the conclusion, it seems to me, must be that the appellee is entitled to an affirmance in all cases where there is a failure to prosecute the appeal according to law; that he is entitled to such affirmance where there is a continued failure, on the part of appellant to give the notice, because that constitutes a failure to prosecute the appeal; that, as in the case at bar, where the cause stands for trial and the appellant fails to appear, that also constitutes a failure to prosecute the appeal, and hence the judgment of affirmance

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was correct. So far as this case is concerned I may add that the record shows that when the defendant's motion to dismiss the suit in the circuit court was overruled it expressly declined to appear further than to perfect this appeal; surely that was not only a failure, but a refusal to prosecute the appeal.

The judgment is, however, in accordance with the opinion of the other members of the court, reversed and the cause remanded for new trial. Sherwood, J., absent:

MASON *et al.* v. CROWDER, *Appellant.*

1. **Sale of Land for Taxes: VOID DEED.** Land offered for sale for taxes and forfeited to the state for want of bidders could not, under the revenue law of 1872 (W. S. chap. 118), be sold again on the same day, and where a tax deed shows that it was so sold, it is void on its face.
2. **Judicial Notice.** A court will take judicial notice of the fact that the first Monday in October, 1873, was the sixth of October of that year.
3. **Land, Sale for Taxes: SPECIAL STATUTE OF LIMITATIONS.** The three years' special statute of limitations (W. S., sec. 221, p. 1207), in cases of land sold for taxes, is no bar to a recovery by the former owner where the purchaser has not been in possession three years after the recording of the tax deed and before the commencement of the action against him.

On Re-hearing.

Tax Deed Void on its Face: LIMITATIONS. A tax deed void on its face will not set such special statute of limitations in motion.

Appeal from Daviess Circuit Court.—HON. S. A. RICHARDSON, Judge.

AFFIRMED.

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Shanklin, Low & McDougal for appellant.

(1) The tax deed divested title out of the respondent's ancestor. 2 W. S. Title Revenue, secs. 195, 217, 219 and 241; 12 U. S. Rev. Stat. at Large, 640; *De Feville v. Smalls*, 98 U. S. 517; *Keely v. Sanders*, 99 U. S. 441. (2) The tax deed is valid; it complies in substance with the requirements of the statute (sec. 217, *supra*), which prescribes the form of the deed is merely directory. Sedg. on Stat. and Const. Law (2 Ed.) 319; *Abbott v. Sartori*, 11 N. W. Rep. 626; *McKane v. Wel-ler*, 11 Cal. 49; *City of Cape Girardeau v. Riley*, 52 Mo. 424; *Pacific Ry. v. Governor*, 23 Mo. 353; *St. Louis v. Foster*, 52 Mo. 513. (3) The tax deed, even if void, is still sufficient in law to give defendant title under the special three years' statute of limitations. 2 W. S. 1207, secs. 221 and 222; *Ry. Co. v. Allfree*, 20 N. W. Rep. 779; *Galling v. Lane*, 22 N. W. Rep. 453; *Young v. Hosack*, 2 Pa. (2 Pen. & Watts) 162; *Pillow v. Roberts*, 13 How. 477; *McMilhan v. Wehle*, 13 N. W. Rep. 694. "Color of title is that which in appearance is title, but which in reality is no title." 14 Am. Dec. 580, and note. See, also, *Crispen v. Hannavan*, 50 Mo. 546; *Jackson v. McGruder*, 51 Mo. 55; *Rannells v. Rannells*, 52 Mo. 108; *Hamilton v. Boggess*, 63 Mo. 233; *Long v. Higgenbot-tom*, 56 Mo. 245; *H. & St. Jo. Ry. v. Clark*, 68 Mo. 471; *Burkhalter v. Edwards*, 16 Ga. 593; *Walls v. Smith*, 19 Ga. 8; *Pillow v. Roberts*, 13 How. (U. S.) 472. (4) The special statute of limitations is constitutional. *Kendall v. United States*, 12 Pet. 609; *Hamilton v. St. Louis*, 15 Mo. 23; *Georgia v. Stanton*, 6 Wall. 50; *Bennet v. Boggs*, 1 Bald. 74; *Gibbony v. City of Cape Girardeau*, 58 Mo. 141; *Carson v. Hunter*, 46 Mo. 467; *Terry v. Anderson*, 95 U. S. 628; *Adamson v. Davis*, 47 Mo. 268; *High v. Shoe-maker*, 22 Cal. 363; *McMillan v. Anderson*, 5 Otto, 37.

Wm. M. Rush, Jr., and Smith & Krauthoff for respondents.

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(1) The collector's deed is not sufficient *prima facie* to convey the title to the defendant. It is not in the form prescribed by the statute. W. S., 1872, p. 1205, sec. 217. The collector had no right to re-sell at public sale until October, 1874, but the deed recites that the land was forfeited and re-sold at the October sales in 1873. Where a statute prescribes a form for a tax deed, the form becomes of substance, and unless it is followed the deed is void. Blackwell on Tax Titles, sec. 5, p. 368; *Atkins v. Kirman*, 20 Wend. 249; *Williams v. Payton*, 4 Wheat. 77; *Williams v. Lanahan*, 67 Mo. 499. (2) The deed is void on its face, and will not set the three years' statute of limitations in motion. W. S., p. 1205, sec. 221; *Moore v. Brown*, 11 How. 414; Blackwell on Tax Titles, 572, 573; *Pack v. Crawford*, 29 Ark. 480; *McClair v. Cork*, 15 Wis. 446; *Wakely v. Mohr*, 18 Wis. 321; *Cutler v. Hurlbert*, 29 Wis. 152; *Shoal v. Walker*, 6 Kan. 65; *Lain v. Shephardson*, 18 Wis. 59; *Grimm v. O'Connell*, 54 Cal. 522; *Hubbell v. Campbell*, 56 Cal. 527; 3 Washb. Real Prop. (4 Ed.) sec. 21, p. 227; *Douglass v. Wilson*, 31 Kas. 565; *Woodman v. Davis*, 32 Kas. 344; *Sutton v. Stone*, 4 Neb. 319; *Cogel v. Ralph*, 24 Minn. 194. The tax sale and deed being unauthorized and void, they could give no rights whatever to the purchaser; they were as ineffectual to give a seizure as to convey title. *Wallingford v. Fiske*, 24 Me. 386; *Wofford v. McKinna*, 23 Tex. 36; *Johnson v. Elwood*, 53 N. Y. 431; Burroughs on Taxation, 342. (5) Statutes of limitations work on the basis of a possession, and where they undertake to transfer a title by lapse of time, without possession being taken, they are unconstitutional. *Harding v. Butts*, 18 Ill. 502; *McBee v. Loftus*, 1 Strobb. Eq. 90; *Potts v. Gilbert*, 3 Wash. C. C. 475; *Robinson v. Lake*, 14 Ia. 421; *Shaw v. Alexander*, 32 Miss. 228; *Johnson v. Arnold*, 2 Jones' Law, 58; *Jackson v. Huntley*, 5 Johns. 58; *Jackson v. McKee*, 8 Johns. 429; Blackwell on Tax Titles, 16-26.

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HOUGH, C. J.—This is an action of ejectment for eighty acres of land in Daviess county. William B. Mason was the patentee of said land, and died seized thereof in 1859, and the plaintiffs are his sole heirs at law. The defendant claims title under a tax deed from the collector of Daviess county, executed on the fourteenth day of March, 1876, and recorded on the same day, and purporting to have been made in pursuance of a sale by the collector in October, 1873, for the taxes of 1872. The defendant went into possession in the spring of 1877, and this suit was brought on the twenty-eighth of July, 1879, more than three years after the tax deed was recorded, but in less than three years after the defendant entered into possession.

The statute applicable to this suit provides that “any suit or proceeding against the tax purchaser, his heirs or assigns, for the recovery of lands sold for taxes, or to defeat or avoid a sale or conveyance of lands for taxes (except in cases where the taxes have been paid, or the land was not subject to taxation, or has been redeemed, as provided by law), shall be commenced within three years from the time of recording the tax deed, and not thereafter.” W. S., p. 1207, sec. 221. It is further provided by the same act that “any person hereafter putting a tax deed on record in the proper county, shall be deemed to have set up such a title to the land described therein as shall enable the party claiming to own the same land to maintain an action for the recovery of the possession thereof against the grantee in deed, or any person claiming under him, whether such grantee or person is in actual possession of the land or not.” W. S., p. 1207, sec. 222.

To avoid the limitations contained in section 221, the provisions of which were specially pleaded by the defendant, the plaintiffs contend that the deed under which the defendant claims does not conform to the require-

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ments of the statute, but is void on its face, and, therefore, not such a deed as will set in motion the special statute of limitations relied upon by the defendant. It appears, from the deed offered in evidence, that judgment was duly rendered at the July term, 1873, of the Daviess county court for the taxes of 1872, and that in pursuance of said judgment, on the sixth day of October, 1873, said land was offered for sale, but remained unsold for want of bidders, and was, therefore, forfeited to the state. The deed further recites that "the description of said real estate, together with the taxes, interest and costs due thereon, as contained in said precept, were, by the clerk of the county court, duly entered and recorded in the forfeited list book of said county; and, whereas, said real estate was not redeemed according to law, during the two years immediately succeeding the date of said forfeiture to the state of Missouri; and, whereas, the collector of said county having given at least four weeks' public notice by publication in the *North Missourian*, a newspaper published in the county of Daviess, in said state, said newspaper being the newspaper having the greatest circulation in said county, and by posting up at least twenty written or printed hand-bills in twenty public places in said county, setting forth that all lands and town lots forfeited to the state for taxes and remaining unredeemed and unsold, would be, on the first Monday of October then next, offered for sale at public auction, at the court-house, in said county, and that a list of such forfeited real estate was then kept in the office of the clerk of the county court of said county, subject to the inspection of all persons wishing to examine the same, did, on the first Monday in October, in the year 1873, at the hour of ten o'clock a. m., at the court-house, in the city of Gallatin, in said county, proceed to publicly offer for sale all tracts of land and lots contained in said forfeited list then unredeemed, and among such tracts the above described real estate, for the taxes, interest and

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costs severally due thereon; and, whereas, at said forfeited list public sale Thomas B. Crowder became a purchaser," etc., etc.

We will take judicial notice of the fact that the first Monday in October, 1873, was the sixth day of October, 1873. It will be seen, therefore, from the recitals in the deed that the land in controversy was, after being forfeited to the state, again publicly sold on the same day to the defendant. This sale being not only without authority of law, but contrary to positive provisions of the statute, and without even a color of right, was a nullity, and the deed made in pursuance of such sale, is void upon its face. It is contended by the defendant, however, that, although the deed may be void, yet, under numerous decisions in this state and elsewhere, it constitutes color of title, and being recorded, is sufficient to set the special statute of limitations of three years in motion.

Under a statute of Wisconsin similar to section 221, *supra*, of our law, it has been held by the Supreme Court of that state that an action cannot be maintained by the original owner of land sold for taxes, against one who has been in possession of it for three years, claiming title in good faith under the tax deed, although the deed is void upon its face. *Edgerton v. Bird*, 6 Wis. 527; *Sprecker v. Wakeley et al.*, 11 Wis. 432; *Lindsay et al. v. Fay*, 25 Wis. 460; *Oconto Co. v. Jerrard*, 46 Wis. 326; *McMillan et al. v. Wehle et al.*, 55 Wis. 685. But in the case last cited it was expressly decided that to make the limitation of three years prescribed by the statute available to persons claiming title under a void tax deed, actual and adverse possession of the land must have been taken and held during the three years next after the recording of the tax deed. Adopting these decisions as expressing the true construction of section 221 of our statute, and the plaintiff's action was not barred, as the

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defendant had not been in possession three years when this suit was instituted.

Nor can the construction thus placed upon section 221, be modified or affected by section 222, which declares that a person putting a tax deed on record shall be deemed to have set up such a title to the land described therein as will authorize a suit against him or his assigns, although he or they may never have taken possession under such deed. The deed contemplated by this section is manifestly such a deed as is *prima facie* good and sufficient to carry the title, and even when so construed the constitutionality of such an enactment is exceedingly questionable. Such a law cannot properly be called a limitation law, and "a person who has a lawful right and is actually or constructively in possession, can never be required to take active steps against opposing claims." *Groesbeck v. Seeley*, 13 Mich. 329; *vide Spurlock v. Dougherty*, 81 Mo. 171. The judgment of the circuit court, which was for the plaintiff, will be affirmed. The other judges concur.

On Re-hearing.

HENRY, C. J.—The conclusion reached in the opinion heretofore delivered in this cause is adhered to; but wherein it holds that a tax deed, void upon its face, constitutes color of title, and when recorded sets the special statute of limitations of three years in motion, if the purchaser takes and holds continuous possession under it for the period of three years before the institution of a suit by the legal owner to recover possession, is retracted. The special statute of limitations has no application except where the tax deed is valid upon its face.

We are aware that the cases in the Wisconsin reports, cited in the former opinion, sustain the contrary view, but several respectable courts hold the doctrine herein announced. *Moore v. Brown*, 11 Edward (U. S.) 414;

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Taylor v. Miles, 5 Kas. 498; *Hubbard v. Johnson*, 9 Kas. 633; *Shoat v. Walker*, 6 Kas. 65; *Hall's Heirs v. Dodge*, 18 Kas. 277; *Larkin v. Wilson*, 28 Kas. 573; *Woofford v. McKinna*, 23 Tex. 36; *Kilpatrick v. Sisineros*, *Ib.* 114; *McGarock v. Pollack*, 13 Neb. 538; *Sutton v. Stone*, 4 Neb. 319; *Towle v. Holt*, 14 Neb. 225; *Cogel v. Raph*, 24 Minn. 194; *Sheehy v. Hinds*, 27 Minn. 259. It has been held in many cases that even a void tax deed constitutes color of title under the general statute of limitations, but the question of color of title does not arise under the special statute in question. The limitation is not based upon adverse possession. Judgment affirmed. All concur.

BOWMAN V. THE CHICAGO & ALTON RAILROAD COMPANY, Appellant.

1. **Railroad: KILLING STOCK: ORDINANCE.** Running a railroad train within the limits of a municipal corporation at a greater rate of speed than permitted by its ordinance, is negligence *per se*, and the road is liable for the killing of stock occasioned by reason of such illegal rate of speed.
2. — : — : —. The railroad would still be liable in such case, although the stock was running at large in violation of the city ordinance, provided it had escaped from the owner's inclosure without his knowledge or consent and the defendant by the exercise of ordinary care and prudence could have stopped the train so as to prevent the killing.

Appeal from Louisiana Court of Common Pleas.—HON. ELIJAH ROBINSON, Judge.

AFFIRMED.

Macfarlane & Trimble and W. H. Morrow for appellant.

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(1) The ordinance regulating the rate of speed of defendant's engines and trains, and imposing a penalty for running at a greater rate than that prescribed by ordinance did not make a violation of such ordinance negligence. The penalty was the only consequence which the law imposed. *Brown v. Railroad*, 22 N. Y. 191, and authorities cited. (2) The ordinance had reference to running of engines and trains over the streets and public grounds of the city and not to the working of trains by defendant on its own yard and depot grounds. The necessity of the police regulation could extend no further than the streets and public grounds of the city. *Cooley on Const. Lim.* 578; *Morris v. Railroad*, 58 Mo. 78; *Swearingen v. Railroad*, 64 Mo. 73; *Robertson v. Railroad*, 64 Mo. 412; *Meyers v. Railroad*, 7 Am. & Eng. Ry. Cases, 406. (3) The ordinance prohibited owners from allowing hogs to run at large in the city, and hogs running at large were declared a nuisance. Negligence will be imputed to plaintiff whatever his care. *Munger v. Railroad*, 4 N. Y. 357; *Corwin v. Railroad*, 13 N. Y. 42; *Railroad v. Stephenson*, 24 Ohio St. 58; *Railroad v. Howard*, 11 Am. & Eng. Ry. Cases, 488; *Spencer v. Railroad*, 25 Iowa, 139; *Turner v. Railroad*, 78 Mo. 578. (4) Plaintiff, being chargeable with contributory negligence, was not entitled to a recovery unless defendant knew or by reasonable care might have known, that the hog was in a position of danger, and was thereafter guilty of negligence. The rate of speed, without such knowledge and subsequent negligence, would not authorize a recovery. *Liddy v. Railroad*, 40 Mo. 519; *Craig v. City of Sedalia*, 63 Mo. 417; *Burnham v. Railroad*, 56 Mo. 338; *Karle v. Railroad*, 55 Mo. 476; *Swigert v. Railroad*, 75 Mo. 475.

M. G. Reynolds for respondent.

(1) The instructions given on the part of plaintiff are correct. The first in substance declares that if the

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engine and train of cars were run at a speed not allowed by ordinance, and by reason of such unlawful running the hog was killed, the defendant is liable. 2 Thompson on Neg., p. 904, sec. 27, and p. 1232, sec. 5; *Karle v. Kansas City & C. Co.*, 55 Mo. 476. The second is to the effect that although the hog was at large in violation of an ordinance, but without the knowledge and consent of plaintiff, and she had been up in a good pen, the verdict should be for plaintiff if they believe she was killed by reason of the defendant running at a rate of speed prohibited by ordinance. *Spence v. C. & N. W. Ry. Co.*, 25 Iowa 139; *Fernow v. Dubuque & S. W. Ry. Co.*, 22 Iowa 528; *Stewart v. C. & N. W. Ry. Co.*, 27 Iowa 282; *Fritz v. Milwaukee & St. P. Ry. Co.*, 34 Iowa 337; *Stewart v. B. & M. Ry. Co.*, 32 Iowa 561. The third tells the jury that as to whether they made any attempt to stop the train might be considered with all the other facts and circumstances, and if they believe they could have stopped the train and failed to do so, defendant was liable. *Brown v. H. & St. Jo. Ry. Co.*, 50 Mo. 461; *Karle v. Kansas City & C. Co.*, 55 Mo. 476. (2) The refused instructions asked by defendant do not declare the law applicable to the case. (3) The demurrer to the evidence was rightly overruled. *Renick v. Walton*, 7 Mo. 292; *Fulkerson v. Baslinger*, 9 Mo. 838; *Watts v. Douglas*, 10 Mo. 676; *McPheeters v. Railroad*, 45 Mo. 24.

PER CURIAM.—This suit was instituted before a justice of the peace upon the following statement: "Plaintiff states that the defendant is a corporation, etc., and was on the ——— day of June, 1882, engaged in operating a railroad in this state, and for a cause of action, says that on the ——— day of June, 1882, he was the owner of one large black and white sow; that on said day defendant, by the negligence, carelessness, and unskilfulness of its servants, agents, and employes in running of its engine within the limits of the city of Louisiana, Missouri, at an unlawful rate of speed, and in

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violation of an ordinance, number eight hundred and ninety-six, duly passed and approved on December 2, 1879, which said ordinance directed and required that no engine, car, or train of cars shall be run at a greater rate of speed than six miles per hour within the limits of said city; that by reason of the negligence of the agents and employes of the defendant in running its engine within the limits of said city at a rate of speed much greater than six miles per hour, and further, by reason of the agents and employes then operating and running said engine, not attempting to stop said engine, the sow aforesaid was by them run over and killed near the depot of the St. Louis, Keokuk & Northwestern Railway Company, in the said city of Louisiana, Missouri, Buffalo township; that said sow was of the value of twenty dollars, for which plaintiff prays judgment."

There was judgment before the justice for plaintiff, an appeal to the common pleas court and on a new trial there, judgment again entered for plaintiff; from which the defendant appealed to this court. On the trial before the court of common pleas, the plaintiff testified to the ownership of the sow, and then read in evidence an ordinance of the city of Louisiana as follows:

"SECTION 1. No locomotive engine, railroad passenger, freight or train of cars used upon railroad tracks, shall be driven, propelled, or run upon or along any railroad track within the limits of the city of Louisiana at a greater rate of speed than six miles per hour.

"SEC. 2. Any railroad company or corporation who shall by themselves, their agents or employes, violate or fail to observe any of the provisions of the foregoing section shall for each failure or violation be fined in a sum not less than twenty-five dollars."

Plaintiff then offered a witness who testified that a switch engine of defendant's road backed a train of cars at a greater rate of speed than six miles per hour, and the same struck and killed the sow in question; also,

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that if said train had been running at no greater rate than six miles per hour, the train could have been stopped in time to have prevented striking the hog.

Defendant thereupon offered in evidence an ordinance of said city, as follows:

"SECTION 1. It shall not be lawful for any hogs of any age to be allowed to run at large within the limits of the city, and any hog or pig found to be running at large are deemed and declared to be a nuisance."

Defendant then offered two witnesses who testified they saw the train when it struck the hog, and it was not running as fast as six miles an hour. Also, evidence tending to prove that the train could have been stopped, but it was on a curve and a signal to stop could not have been seen by the engineer in charge, and that the hog left the track, and without the knowledge of those in charge of the train, returned to the track and was struck.

In rebuttal, plaintiff testified that he had his hog in a good pen, from which she escaped without his knowledge or consent.

For the plaintiff the court gave to the jury the following instructions:

"1. The court instructs the jury that if they believe from the evidence that there was an ordinance in force in the city of Louisiana, prohibiting railroads from running their engines and trains of cars at a greater rate of speed than six miles per hour in the city limits, and that defendant, by its agents and employes, did, on the ——— day of June, 1882, negligently run its engine and cars on the hog of plaintiff by running said engine and train of cars at a greater rate of speed than six miles per hour, and that by reason of said running said hog was killed, then defendant is liable, and the verdict should be for the plaintiff."

The second instruction was to the effect that defendant's liability would be the same, though the hog was running at large contrary to an ordinance, if it escaped

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without the knowledge or consent of plaintiff, providing they further find she was killed by the negligence of defendant's agents or employes as set forth in instruction number one.

"3. If defendant's employes could, by the exercise of ordinary care, have stopped the train so as to have prevented the killing of the hog, the verdict should be for plaintiff."

I. The first instruction given on the part of the plaintiff is in accord with the doctrine laid down in *Karle v. K. C., St. Jo. & C. B. Ry.*, 55 Mo. 476; and in *Kelley v. H. & St. Jo. Ry.*, 75 Mo. 138, where it is held that, where a municipality having the power, passes an ordinance fixing the rate of speed beyond which locomotives and cars shall not be run within the corporate limits, a violation of such ordinance is negligence *per se*; and when the evidence shows further that an injury occurs, which is caused by the prohibited rate of speed, then the railroad company is liable. But, unless it is shown that the injury was caused by the speed exceeding that prohibited by the ordinance, there is no liability. The first instruction squarely presented these questions, and was not objectionable.

II. The second instruction for the plaintiff includes the theory of the first, and also includes the further question that defendant would be liable, notwithstanding the fact that the plaintiff's hog was running at large in violation of a city ordinance; provided the jury believed from the evidence that plaintiff's sow had been in a good pen and had got out and was at large without the knowledge or consent of the plaintiff. That if the jury believed the sow was killed by the negligence of defendant's agents, as set forth in the first instruction, they must find for the plaintiff. In *Spence v. The C. & N. W. Ry. Co.*, 25 Iowa 139, it was held that where a railway was liable for injury to swine occurring at a place where the road had failed to fence its line, the fact that swine were

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prohibited by law from running at large, would not relieve the road from liability, unless it be shown that such injury was occasioned by the wilful act of the owner or agent. The same doctrine is re-affirmed in *Fritz v. The M. & St. P. Ry. Co.*, 34 Iowa 337. These authorities fix negligence *per se* on defendant, by running their trains at a greater rate of speed than that permitted by the ordinance, and that if, in addition thereto, it be shown that the killing or injury was caused by this illegal rate of speed, then the defendant is liable; and would be liable even though the sow was at large in violation of another ordinance, provided, it be shown that she was so at large without the knowledge or consent of plaintiff, and provided, further, that defendant's employes could have by the exercise of ordinary care and prudence, stopped the train so as to have prevented the killing.

These questions were all fairly presented to the jury by the plaintiff's instructions and were passed on by them. Upon some of the questions, notably the rate of speed, there was a conflict of evidence. But all things considered, the jury found for the plaintiff, and their verdict must stand. *Burhan v. St. L. & I. M. Ry.*, 56 Mo. 338; *Robertson v. W., St. L. & P. Ry. Co.*, 84 Mo. 119.

The judgment of the court below is affirmed.

THE STATE V. McDONALD, *Appellant*:

1. **Practice, Criminal: GENERAL VERDICT.** A general verdict upon an indictment containing three counts, charging the same offence in different forms, is sufficient.
2. — : **EXCEPTIONS.** The practice in criminal cases in regard to matters of mere exception is the same as in civil cases. Where defendant saves no exceptions during the progress of the trial, only the record proper will be reviewed upon appeal.

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Appeal from St. Louis County Circuit Court.—HON.
W. W. EDWARDS, Judge.

AFFIRMED.

The defendant was jointly charged with several others, in the circuit court of St. Louis county, with robbery in the first degree, upon the following indictment:

“The grand jurors of the state of Missouri now here in court duly empaneled, sworn, and charged to inquire within and for the body of the county of St. Louis, and state of Missouri, upon their oaths, present and charge that Wm. Dwyer, Richard Gleason, Patrick Dalton, Robert McDonald, Peter Welsh, and Joseph Montgomery, on the thirtieth day of May, A. D., one thousand eight hundred and eighty-four, at the county of St. Louis, in the state of Missouri, in and upon one Anton Dam then and there being, unlawfully and feloniously did make an assault; and two dollars and fifty cents of the money and property of the said Anton Dam from the person, and against the will of the said Anton Dam, then and there by force and violence to the person of the said Anton Dam, feloniously did rob, steal, take, and carry away, against the peace and dignity of the state.

“And the grand jurors aforesaid, upon their oath aforesaid, further present and charge, that the said William Dwyer, Richard Gleason, Patrick Dalton, Robert McDonald, Peter Welsh, and Joseph Montgomery, on the thirtieth day of May, 1884, at the said county of St. Louis and state aforesaid, in and upon one Mina Dam, then and there being, unlawfully and feloniously, did make an assault, and one ear-ring of the value of fifty cents, of the goods and chattels and personal property of the said Mina Dam, from the person and against the will of the said Mina Dam, then and there by force and

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violence to the person of the said Mina Dam, feloniously did steal, take, and carry away, against the peace and dignity of the state.

"And the grand jurors aforesaid, upon their oath aforesaid, do further present and charge, that the said William Dwyer, Richard Gleason, Patrick Dalton, Robert McDonald, Peter Welsh, and Joseph Montgomery, on the thirtieth day of May, 1884, at the county of St. Louis, in the state of Missouri, in and upon Anton Dam and Mina Dam, then and there being, unlawfully and feloniously, did make an assault, and two dollars and fifty cents in money, of the value of two dollars and fifty cents, of the money and personal property of the said Anton Dam, then and there by force and violence to the person of the said Anton Dam, feloniously did rob, steal, take, and carry away, and one ear-ring of the value of fifty cents of the goods, chattels, and personal property of the said Mina Dam, from the person and against the will of the said Mina Dam, feloniously did rob, steal, take, and carry away, against the peace and dignity of the state."

A severance was granted defendant, and, upon trial, he was convicted and sentenced to ten years' imprisonment in the penitentiary. After unsuccessful motions for new trial and in arrest of judgment, he appealed to this court.

Zach. J. Mitchell for appellant.

(1) The court erred in failing of its own motion to instruct as to an *alibi*, in favor of defendant. *State v. Branstetter*, 65 Mo. 155; *State v. Lewis*, 69 Mo. 92. An *alibi* is an ordinary defence and should be instructed upon. 1 Bish. on Crim. Proc., secs. 1062, 1064, 1065, 1066, 1067; *Commonwealth v. Choate*, 105 Mass. 459; *Howard v. State*, 50 Ind. 190; *State v. Hardin*, 46 Iowa 623; *State v. Walker*, 42 Tex. 360; *Briceland v. Commonwealth*, 24 Pa. St. 462. (2) Instruction number one is erroneous and confusing. *State v. Davidson*, 38 Mo.

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378. (3) The court erred in instructing for a general finding upon the three counts in the indictment. (4) There was no evidence to support a general verdict as found. (5) There was no evidence to support any verdict as against defendant.

B. G. Boone, Attorney General, for the state.

(1) The action of the court, in the progress of the trial, was proper. Defendant saved no exception to the admission or the rejection of evidence, the sustaining or overruling of any motion, or the giving or refusing of any instruction; these matters constitute no part of the record proper, and will not be reviewed by this court. *State v. Pints*, 64 Mo. 317; *State v. Williams*, 77 Mo. 310. (2) Although there were several counts in the indictment, but one offence was charged, and the court properly instructed the jury that a general finding would be sufficient. *State v. Miller*, 67 Mo. 604. (3) The evidence was sufficient to justify the instructions given, and the verdict was responsive to the law and the evidence. Section 1302, R. S.; *State v. Broderick*, 59 Mo. 318. (4) There was no evidence offered to support an *alibi*, and if an instruction had been asked on this point, it would have been properly refused. *Alibi* is mere ordinary evidence in rebuttal. Sec. 1062, Bishop Crim. Procedure, 3 Ed. Unless evidence is offered to support an *alibi*, and it is attempted to be made a defence, the trial court will not be authorized in giving an instruction as to reasonable doubt of the defendant's presence at the time of the commission of the crime. *State v. Lewis*, 69 Mo. 92. A general instruction as to reasonable doubt was given, and it was all that was warranted by the evidence.

SHERWOOD, J.—The defendant was indicted for and convicted of the crime of robbery, in the first de-

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gree, and his punishment assessed at ten years' imprisonment in the penitentiary.

I. The evidence has been carefully examined, and in our opinion is sufficient to support the verdict.

II. The indictment, though containing three counts, really charges in different forms but one and the same offence, and, therefore, a general finding of guilty was sufficient, and no specification of the particular count was necessary. *State v. Miller*, 67 Mo. 604.

III. The rule in criminal cases in regard to matters of mere exception is precisely the same as in civil. R. S., sec. 1921. And as defendant saved no exceptions during the progress of the trial, nor in reference to the instructions, nor upon the overruling of his motions, there is nothing presented by the record calling for review. *State v. Marshall*, 36 Mo. 400; *State v. Ray*, 53 Mo. 345; *State v. Pints*, 64 Mo. 317; *State v. Williams*, 77 Mo. 310.

Therefore, in the absence of any defect in the record proper, the judgment must be affirmed. All concur.

THE STATE V. BLOUNT, *Appellant*.

1. **Fish Law: BAYOU: WATERS OF STATE.** A bayou extending back from Lake Contrary, a public body of water in Buchanan county, and into which from the lake fish have free and uninterrupted access, and not being wholly on premises belonging to the defendant, falls within the description "waters of the state" in Revised Statutes, section 1625, which forbids the erecting or maintaining of any seine, net or trap, etc., "in any waters of the state and the catching of fish therein by any such means."
2. —: **STATUTE, CONSTRUCTION OF: WATERS WHOLLY ON PREMISES, ETC.** Said section 1625, Revised Statutes, contains a proviso that the prohibitions therein shall not apply to waters wholly on the premises belonging to such person or persons using such device

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or devices; *held*, that the word "persons" means joint owners and before any person or persons can claim the protection of the proviso, if a sole owner of the land, he must show, and if a joint owner with others, they must show, that the waters are wholly on the premises of such owner or owners. If a stream, it must have its source and its mouth and its whole course on the sole owner's or the joint owner's land; and if a lake or bayou it must be entirely surrounded by the lands of the sole or joint owners to be wholly on the premises of such owner or owners.

5. **Constitution.** The provisions of said section 1625, Revised Statutes, are not in conflict with the constitution of the state nor of the United States.

Appeal from Buchanan Circuit Court.—HON. W. H. SHERMAN, Judge.

AFFIRMED.

J. P. Thomas for appellant.

(1) The statute under which the indictment was found applies to public waters only, and not to private waters. R. S., sec. 1625. (2) If the language of the statute is broad enough to include within its prohibition the bayou in question, it takes or damages private property without any compensation therefor; it deprives a person of property without due process of law, and is, therefore, unconstitutional and void. Constitution of Missouri, art. 2, secs. 21, 30; Constitution of United States, art. 5 of amendments.

D. H. McIntyre, Attorney General, for the state.

NORTON, J.—Defendant was indicted in the Buchanan circuit court for netting and trapping fish in violation of section 1625, Revised Statutes. The cause was tried upon an agreed statement of facts; defendant was found guilty, and fined two hundred and nine dollars. From this judgment he has appealed. The agreed statement of facts is as follows:

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"1. That the water described in the indictment is a bayou flowing into and connecting with Lake Contrary, in Buchanan county, Missouri, as is shown by McAleer's map of Buchanan county; and that Lake Contrary is a public body of water; and that the said bayou was surveyed as land, as is shown by the field notes and maps of the surveyors and engineers of the United States. That said bayou extends, for more than a mile from its entrance into Lake Contrary, back into the country, and is about one hundred yards wide at its junction with the lake, and ten feet deep, and that fish from the lake have always had, and still have, free and uninterrupted access into said bayou from the main lake, and from the bayou into said lake; that thousands of California salmon and shad have been placed in said lake by the fish commissioners of Missouri, and all may pass into and out of said bayou from the lake into which they were placed.

"2. That the defendant, at the county of Buchanan, about the time alleged in the indictment, and in the manner charged in the indictment, did, in the waters of said bayou, fish, seine and net, the defendant then and there for so fishing, seining and netting, having the consent and authority of the owners of all the land on each side of the said bayou, and adjacent thereto, and on which the waters of said bayou are located."

It is contended, on behalf of defendant, that the bayou in question is not such a body of water as the statute forbids fish from being taken by seines, nets, traps, etc. The statutory provisions are as follows: Section 1625, Revised Statutes, forbids, under penalty therein prescribed, the erecting or maintaining of any seine, net or trap, * * * in any waters of the state, or in front of the mouth of any stream, slough or bayou, and prohibits the taking or catching of any fish in the

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"waters of the state" by any such means. It further provides that such prohibition shall not apply to waters wholly on the premises of such person or persons, using such devices. The term "waters of the state" is defined by section 1631, of Revised Statutes, to mean "all streams, lakes, ponds, sloughs, bayous, or other waters, wholly, or in part, within the state, excepting the Missouri and Mississippi rivers, and all such parts of said rivers as shall be within five hundred feet of the mouth of any river, creek, branch, slough, bayou, or other water, emptying into or connected with said rivers, within or on the boundary lines of the state."

That the bayou in question falls within the definition above given of "waters of the state," seems to us to be too clear for argument. Bayous are designated by name as being "waters of the state," and as the bayou in question is not wholly on the premises belonging to defendant, he is not protected by the proviso contained in section 1625, *supra*, viz.: that the prohibition of the section shall not apply to waters wholly on the premises of such person or persons using such devices. We are of the opinion that the word persons, as used in the proviso, means joint owners, and before any person or persons, can claim the protection of the proviso, if a sole owner of land, he must show, and if a joint owner with others, they must show, that the waters are wholly on the premises of such owner or owners. If a stream, it must have its source and its mouth, and its whole course, on the sole owner's, or the joint owner's land; and if a lake or bayou, it must be entirely surrounded by the lands of the sole or joint owners, to be wholly on the premises of such owner or owners. Viewing the statute in this light, and we cannot look at it in any other, without ignoring the plain words, as well as the object of the law, the owners of the land on each side of this bayou, could neither singly, nor unitedly, seine, net, or trap therein.

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It is further contended by counsel, that if the statute means this, that it is a violation of both the constitution of the state and the United States, which forbid the taking of private property for public use. While conceding the ingenuity of the argument made in support of this proposition, I cannot admit its soundness. The property which a man hath in animals, *feræ naturæ*, is a qualified property; that is, he may have the privilege of hunting, taking and killing them on his own premises, to the exclusion of others. He has but a transient property in these animals, usually called game, so long as they continue within his premises. 2 Black Com. 394. This qualified, transient property, is not taken away by the statute. One who may have the right to take fish from such waters as are specified in the statute, is not denied the right to do so, but, in order to the preservation of fish and prevent their destruction, the state, in the exercise of its police power, simply forbids them from being taken by the use of certain prohibited methods. He can exercise such right in any other method than those which the statute prohibits.

In the exercise of this power the state, in various statutes, forbids the killing or capturing of certain kinds of game within certain periods of the year, and forbids their capture by the use of certain means during the other periods of the year, and such laws have never been supposed to be obnoxious to constitutional provisions declaring that private property shall not be taken for public use without compensation.

Judgment affirmed, in which all concur.

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KINGSLAND-FERGUSON MANUFACTURING COMPANY, Appellant, v. CULP.

1. **Personal Property, Conditional Sale of.** A sale and delivery of personal property prior to the going into effect of the act of March 15, 1877 (Laws, p. 320; R. S., sec. 2505), on condition that the title was to remain in the vendor until the purchase price was paid, did not pass the title to the vendee until the condition was complied with, and if the purchase price was not paid the vendor could recover possession of the property either of the vendee or of a purchaser from him, and recovery could be had of such purchaser notwithstanding he was a *bona fide* one and without notice of the condition.
2. **Laches.** No laches was imputable to the plaintiff in this case to bar its recovery.

Appeal from Newton Circuit Court.—HON. M. G. MCGREGOR, Judge.

REVERSED.

George Hubbert for appellant.

(1) The sale being a conditional one, the title did not vest in the vendee, and a *bona fide* purchaser is not protected. *Sumner v. Cotley*, 71 Mo. 121; *Wangler v. Franklin*, 70 Mo. 659; *Ridgeway v. Kennedy*, 52 Mo. 24; *Parmlee v. Catherwood*, 36 Mo. 479; *Little v. Page*, 44 Mo. 412. (2) The plaintiff was guilty of no neglect or laches which would bar his recovery. *Powell v. Bardlee*, 9 G. and J. (Md.) 220; *Farlow v. Ellis*, 15 Gray 229. (3) A creditor can pursue two or more concurrent remedies without prejudice to his substantial rights, and until he obtains satisfaction cannot be questioned. *Thornton v. Pigg*, 24 Mo. 251; *Burnheimer v. Hart*, 27 Iowa 19; *State, etc., v. Dean*, 40 Mo. 468; *State, etc., v. Doan*, 39 Mo. 44. (4) No estoppel can be invoked against plaintiff. *Taylor v. Zepp*, 14 Mo. 482; *Spurlock v. Sproule*, 72 Mo. 509; *Bates v. Perry*, 51 Mo. 453; *Zuchtman v. Roberts*, 109 Mass. 53.

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Smith & Krauthoff for respondent.

(1) Where the vendor, in cases of conditional sales, is guilty of laches, he cannot reclaim the property, when the price has not been paid, from one who has purchased from the vendee in good faith and without notice. *Parmlee v. Catherwood*, 36 Mo. 480; *Little v. Page*, 44 Mo. 412; *Ridgeway v. Kennedy*, 52 Mo. 24; *Robbins v. Phillips*, 68 Mo. 100; Wells on Replevin, sec. 343; *Sanders v. Keber*, 28 Ohio St. 630. The evidence shows plaintiff to have been guilty of such laches as to bar recovery by him. (2) The answer of the defendant "prays judgment for a return of the property seized in the cause," which meets fully the requirement of section 3854, Revised Statutes. Plaintiff did not observe this, else the first point contained in its brief would have been omitted. (3) It has been expressly decided that while the party cannot be compelled to elect whether he will take the property or its value, before the property has been delivered to the sheriff under the judgment of the court, yet, when he does so elect after verdict in his favor, the court may properly render a simple money judgment in pursuance of such election. *White v. Graves*, 68 Mo. 218; *Wooldridge v. Quinn et al.*, 70 Mo. 370.

L. M. Lloyd also for respondent.

(1) The judgment against the Edwards for the value of the "thresher outfit" operated to transfer the title to the Edwards and to estop a claim by appellant to the property. *Bank of Beloit v. Beale*, 11 Abb. 375; 20 How. 331; 19 How. 91; 2 Whittaker's Practice (3 Ed.), 101. (2) The notes and the clause relied on by appellants as creating the conditional sale merged into the judgment obtained by appellant against the Edwards

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in February, 1879, and before respondent purchased the "thresher outfit." *Cooksey v. Railroad*, 74 Mo. 477; Freeman on Judgments (2 Ed.) secs. 215, 216, 217; *Blake v. Downey*, 51 Mo. 438; *Union R. R. & T. Co. v. Troube*, 59 Mo. 355. The cause of action is changed into a matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. Bigelow on Estoppel (2 Ed.) note 5, pp. 50, 51. In *United States v. Price*, 9 How. 83, the court said "that a judgment was an extinguishment of the bond. It no longer existed as a security, being superceded, merged and extinguished in the judgment. The creditor had no longer any remedy, either at law or in equity, on his bond, but his remedy was on the judgment." Bigelow on Estoppel (2 Ed.) 56, 57, 219, and note 4, p. 220. (3) The appellant had ample time to insist on its right to have the condition performed or the property restored, but it did neither, and by its conduct for four years, clearly showed that whatever right or intention it may have had, had been waived or abandoned. *Robbins v. Phillips*, 68 Mo. 101.

NORTON, J.—This is a suit in the nature of replevin to recover certain specific personal property described in the petition, and known as the "thresher outfit." Defendant obtained judgment, from which the plaintiff has appealed. The facts are as follows:

In July, 1876, plaintiff sold to J. W. Edwards, W. L. Edwards, and P. H. Edwards, the thresher outfit, for which they executed two notes for two hundred and ten dollars each, one of them payable on the first of November, 1876, and the other on the first day of October, 1877, in both of which notes it was expressly provided that the title or ownership of the property should not pass from the plaintiff until the property was fully paid for; that soon after the maturity of the first note, defendants made a payment of one hundred and fifty dol-

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lars thereon; that on the twenty-second of January, 1878, about three months after the maturity of the second note, suit was brought on both notes in the Newton county circuit court, and judgment obtained for the balance due in February, 1879, against two of the Edwards (one of them, W. L. Edwards, not being served); that execution issued on the judgment and was returned to the February term, 1880, not satisfied; that this suit was begun on the twelfth day of July, 1880, against defendant Culp, who, in the last of June or first of July, 1879, bought the property of J. W. Edwards, paying therefor one hundred and fifty dollars in cash, and executing his note for one hundred dollars; that defendant, so far as the record shows, had no knowledge or notice of plaintiff's claim.

On this state of facts, the court refused instructions asked by plaintiff, to the effect that under the conditions of the sale plaintiff was entitled to recover, although the jury might believe that defendant was a purchaser without notice of plaintiff's claim, and gave the following:

"The court instructs the jury that although the plaintiff made a conditional sale of the machine to J. W. Edwards and others, and it was provided in the note given for the purchase price of the machine that the ownership thereof should remain in plaintiff until the said machine was paid for; yet, if said note became due in 1876, and said machine was allowed to remain in possession of Edwards long after the maturity of said note, and was never taken out of their possession, and if the defendant, in the year 1879, bought said machine in good faith of the Edwards and paid a valuable consideration therefor without any notice of plaintiff's claim, then plaintiff cannot recover in this action."

It is established by the following authorities that where there is a sale and delivery to the vendee of personal property, on the condition that the title is to re-

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main in the vendor until the purchase price is paid, until this price is so paid the title does not pass to the vendee, and in the event of its non-payment, the vendor may recover possession of the property either of his vendee or of a *bona fide* purchaser from such vendee without notice of such condition, if guilty of no laches : 36 Mo. 479 ; 44 Mo. 412 ; 52 Mo. 24 ; 70 Mo. 659 ; 71 Mo. 121. As to what will amount to such laches as will prevent the vendor from asserting his right against an innocent purchaser, we have been unable to find any rule laid down, and the question has been determined in the cases which have fallen under our observation by the facts and circumstances attending the particular case. Looking at the case before us in the light of the facts we cannot impute such laches to the plaintiff. His rights under the contract were to have the purchase price agreed to be paid, and in the event of non-payment, to recover the property sold. As no voluntary payment, except fifty dollars, had been made by the vendees, plaintiff, as was his right, within three months after the maturity of the last note, instituted his suit on both notes, the writ being returnable to the first term of the Newton county circuit court held after the right of action accrued, obtained judgment, issued execution, which was returned February, 1880, not satisfied. It thus appearing that the vendees did not voluntarily pay the purchase price, and that its payment could not be enforced by legal process, this suit was instituted, the writ of summons being returnable to the first term of the circuit court to be held after the execution was returned unsatisfied. As plaintiff availed himself of the remedies he was entitled to under his contract at the earliest time practicable after his rights accrued, we cannot impute to him such laches as forbids a recovery in this suit.

The decision in the case of *Robbins v. Phillips*, 68 Mo. 101, to which we have been cited by counsel, was put upon the express ground that the vendor, by accept-

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ing a note without security, in fulfillment of the contract of sale made six months before suing, recovering judgment thereon and levying the execution on the horse sold as the property of the vendee and defendant in the execution, amounted to an abandonment and waiver of his right under the contract of sale as originally made. The doctrine invoked by defendant's counsel that a note or bond, when reduced to judgment, is merged in the judgment, has no application to the facts in this case. Section 2505, Revised Statutes, has no application to the facts in this case, inasmuch as the rights of plaintiff accrued under a contract made prior to its enactment.

For the error committed in giving the instruction herein quoted, and in refusing to give those of plaintiff referred to, the judgment is reversed and the cause remanded. All concur.

The STATE v. HOSMER, *Appellant*.

1. **Special Judge, Election of:** STATUTE. When under Revised Statutes, section 1107, a special judge is elected by the members of the bar to sit in the trial of a cause, such election is not invalidated by the fact that the record fails to recite the special fact or facts which disqualified the regular judge.
2. **Prosecutions for Libel and Slander:** STATUTE, CONSTRUCTION OF. Revised Statutes, section 1564, which provides that, "in all prosecutions for libel or verbal slander, the truth thereof may be given in evidence to the jury, and shall constitute a complete defence. And the jury under the direction of the court shall determine the law and the fact," is but a reassertion of the rule that the jury should receive from the court the law applicable to the testimony in the cause and find the issues of fact thereunder, as in other cases.
3. ———: PRACTICE: BURDEN OF PROOF. When in a prosecution for libel, the publication of the libelous matter is proved by the state, the burden is then on the defendant to justify the publication.

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Appeal from Webster Circuit Court.—F. M. MANSFIELD,
Esq., Special Judge.

AFFIRMED.

C. W. Thrasher for appellant.

(1) The court had no jurisdiction to order the election of a special judge. (2) The record should show the facts necessary to authorize the election of a special judge under the statute. *State v. St. Louis*, 1 Mo. App. 503; *McCoy v. Zane*, 65 Mo. 11; *Smith v. Haworth*, 53 Mo. 88; *Schell v. Leland*, 45 Mo. 289; *Wood v. Boots*, 60 Mo. 546; *Kansas v. Campbell*, 62 Mo. 585; *Ellis v. Ry.*, 51 Mo. 200. (3) The court below erred in accepting the juror Love. (4) The court also erred in refusing to give for defendant the instruction to the effect that the jury were to determine the law and the facts. R. S., sec. 1594. And the court also erred in refusing to instruct for defendant that the jury could not convict, unless they found the words charged as libelous were false.

D. H. McIntyre, Attorney General, for the state.

(1) The record recites that the regular judge was disqualified from sitting, and that a special election being ordered, F. M. Mansfield was elected and qualified. This was sufficient. Besides, objections to the jurisdiction of the special judge should have been made at the time and cannot be entertained here. *State v. Dodson*, 72 Mo. 283. (2) The juror Love was competent. (3) Section 1594, Revised Statutes, 1879, does not mean that the jury are to be the judges of the law, but that under the instructions of the court they are to find the facts. The finding of the facts under the direction of the court is a finding of the law and the fact, or the application of the law to the facts. *Hardy v. The State*, 7 Mo., top p. 303;

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United States v. Battiste, 2 Sumner (U. S.) 240; *Com. v. Porter*, 10 Met. 263; Greenlf. Evid., sec. 179. (4) It was not error to refuse defendant's instruction telling the jury that unless they found the words in the information false, they should find defendant not guilty. This instruction had already been given. *State v. Walton*, 74 Mo. 270. And it devolved upon the defendant to show the truth of the language complained of. If the state proves the publication of a libelous article by defendant, it makes out a *prima facie* case, and it devolves upon defendant to rebut such evidence or prove the truth of the alleged libelous publication. *Roscoe's Cr. Ev.*, 685; *Lagrone v. State*, 12 Tex. App. 426.

HENRY, C. J.—This is an information filed by the prosecuting attorney of Webster county, in this state, against defendant for publishing an alleged libel. The cause was tried before F. M. Mansfield, as special judge. Defendant was convicted, and has appealed to this court. The entry of record, in relation to the election of a special judge, is as follows :

"STATE OF MISSOURI	}	Libel.
v.		
"EDMUND HOSMER.		

"Now, at this day, comes the prosecuting attorney, etc., and also the defendant in his own proper person, and by attorney, and, the judge being disqualified from sitting in this case, and a special election of a judge being ordered, whereupon the clerk calling the roll of attorneys, and by a role of the disinterested members of the bar, F. M. Mansfield, a qualified member of the bar, was duly elected," etc.

It is urged that the judgment is void, because Mansfield was not duly elected, and the point made is, that the order, failing to state the fact or facts which disqualified the regular judge, invalidated the election of a special judge. Section 1107, Revised Statutes of Mis-

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souri, which provides for the election of a special judge of a circuit court, is as follows: "Whenever the judge from any cause shall be unable to hold any term, or part of term, of court, and shall fail to procure another judge to hold said term, or part of term; or if the judge is interested or related to, or shall have been of counsel for either party; or when the judge, if in attendance, for any reason cannot properly preside in any cause, or causes, pending in such court, and the parties to such cause, or causes, fail to agree to select one of the attorneys of the court to preside and hold court, for the trial of the cause or causes, the attorneys of the court, who are present, but not less in number than five, may elect one of its members then in attendance having the qualifications of a circuit judge, to hold the court for the occasion."

There is nothing in the section which expressly requires that the facts which disqualify the judge should appear in the order, nor is there anything in the nature of the case which renders it necessary. The disqualifying facts are not issuable when the judge himself declares their existence. He alone determines, in such case, his own disqualification, and there is no necessity for stating more in the order than the one under consideration contains.

The objection to the competency of the juror Love is not well founded. On his *voir dire* he stated, on being asked if he had formed or expressed an opinion as to the guilt or innocence of the defendant, that, on general principles, he might say he had formed an opinion, but not in this particular case; that his opinion on general principles was, that some of the statements in some of the communications were not true, but about this case he had formed no opinion, and would be controlled by the law and the evidence. The meaning of the juror is somewhat obscure in some respects, but it is clear

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enough that he had formed no opinion of the defendant's guilt or innocence in this case; that is what he said.

The defendant asked the court to declare the law to be, "that, under the law, the jury are to determine the law and the facts in this case." Section 1594, Revised Statutes, 1879, is as follows: "In all prosecutions for libel or verbal slander, the truth thereof may be given in evidence to the jury, and shall constitute a complete defence. And the jury, under the direction of the court, shall determine the law and the fact." I confess that I do not fully comprehend the meaning of the remarkable concluding clause of that section. If it means what appellant's counsel contends it does, then, in prosecutions for libel or slander, the court need give no declarations of law to the jury at all. The instruction he asked was not in the language of the law. From it are omitted the words, "under the direction of the court." As well contend on such a construction, that the jury may determine the facts, without regard to the testimony of the witnesses. Can it be that the legislature intended that in a prosecution for libel, the jury might try the cause on their own views of the law, and that they should, if they saw proper, disregard instructions the court might give them as the law applicable to the case? If so, then the court should abstain from giving instructions to the jury in prosecutions for libel, whereas, in all other criminal proceedings it is error not to declare the law to the jury, as has been repeatedly held by this court.

If we may venture to construe the language, our conjecture is, that it simply reasserts what has always been the law, that the jury should learn of the court the law applicable to the testimony in the cause, and find the issues of fact under the guidance of the court, as in other causes. If it means more than this, and is as broad in its significance as appellant's counsel contends, then the court, in the trial of such causes, is but a figurehead, and might be dispensed with entirely. We

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cannot give it such scope as this, and think the court very properly refused the instruction asked. The section is but a declaration of the duty of a jury to determine the law, as well as the facts, under the direction of the court, and there was no necessity for any instruction based upon that clause of the section. If the jury must determine the law "under the direction of the court," then they must be guided by the directions which the court may give and not by what they may determine the law to be. If this is the interpretation to be given it, and certainly it fairly admits of no other, it is impossible to conjecture why that clause was inserted in the section, for it simply declares, with respect to prosecutions for libel, a practice which has always obtained in criminal prosecutions.

Appellant also complains of the refusal of the court to give an instruction asked by him, to the effect that the jury should acquit him unless they found that the words charged in the information were false. The court, of its own motion, instructed the jury that they should acquit defendant unless the words charged in the information were false, but that it devolved upon the defendant to show that they were true. There can be no objection to that instruction. The first clause is what the defendant asked and the latter was properly added. When the publication of libelous matters by the defendant is proven, the burden of proof is on the defendant to show any facts which justify the publication. 2 Greenleaf's Evidence, p. 422, sec. 427 (14 Ed.)

All concur in the affirmance of the judgment.

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GLASGOW V. BAKER *et al.*, Appellants.

1. **Land and Land Titles :** ST. LOUIS COMMON FIELD LOTS: ACT OF CONGRESS OF JUNE 12, 1812. It is the settled construction of the act of congress of June 12, 1812 (2 U. S. Statutes at Large, 748), that the act, by the force of its own terms, vested in each inhabitant of the then village of St. Louis the title in fee to the common field lot which he possessed or cultivated prior to December 20, 1803, the date of the cession from France to the United States. Said act conferred on such inhabitant the lot so possessed or cultivated without any conditions of survey, or without any other or further proof of title derived from the Spanish or French government than that of inhabitancy and cultivation or possession. *Glasgow v. Lindell's Heirs*, 50 Mo. 60, and *Glasgow v. Baker*, 72 Mo. 441, re-affirmed.
2. — : — : —. The confirmees under the act of congress of 1812 by complying with the act of congress of May 24, 1824 (4 U. S. Stat. at Large 65), making it their duty to designate their out lots by making proof of their boundaries, possession and cultivation before the recorder, secured a recognition of the boundaries, but there was no forfeiture by reason of their failure to do so. The confirmee still held the title by force of the act of 1812.
3. — : — : —. The title confirmed by the act of 1812 is a good title, although the surveyor general failed to include the land within the boundaries of the survey made by him.
4. — : — : —. The act of congress of March 6, 1820, granting the sixteenth section in each township for school purposes did not extend to any of the common field lots confirmed by the act of 1812; not even to those not rightfully owned by the individuals claiming them.

Appeal from St. Louis Court of Appeals.

REVERSED.

C. Gibson and C. E. Gibson for appellants.

(1) The location of the sixteenth section within the range of the common field lots of the Grand Prairie is void. *Glasgow v. Lindell Heirs*, 50 Mo. 60, and *Glasgow v. Baker*, 72 Mo. 441; *Page v. Scheibel*, 11 Mo. 187;

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Glasgow v. Hortiz, 1 Black, 595. An abandonment is not presumed, but must be affirmatively proved, and when the defendants show that all the land was in cultivation it devolves upon them to prove that there were any abandoned lots in Grand Prairie field. *Tayon v. Ladew*, 33 Mo. 205; *Clark v. Hammerle*, 36 Mo. 620; *Fine v. Schools*, 39 Mo. 63. (2) Even if the surveys were invalid and did not conform to the certificates of confirmation (which is denied) still their correctness or validity cannot be questioned by the plaintiff, as they are conclusive as to him. *Carondelet v. St. Louis*, 29 Mo. 527; *McGill v. Sommers*, 15 Mo. 80; *Milburn v. Hardy*, 28 Mo. 520. (3) The certificates of confirmation and surveys thereunder were valid and were at least *prima facie* evidence against plaintiff. *Page v. Scheibel*, 11 Mo. 173; *Joyal v. Rippey*, 19 Mo. 660; *Boyce v. Papin*, 11 Mo. 25. (4) The judgment in any event should be set aside as to the Laroche arpent. In the second judgment the failure of the court to grant plaintiff a judgment for the Laroche tract was a direct adjudication that he was not entitled to said tract *Thompson v. McKay*, 41 Cal. 221; *Woodin v. Clemons*, 32 Ia. 280; *Johnson v. Murphy*, 17 Tex. 216. A judgment was not always a unit even at common law and certainly not under the code. 3 Bac. Abr. 386; *Hopkins v. Organ*, 15 Ind. 188; *Wescott v. Bridewell*, 40 Mo. 146; *State v. Alexander*, 56 Mo. 131; *Morgan v. Railroad*, 76 Mo. 161; *Thorpe v. Johnson*, 76 Mo. 662; *Ricketson v. Richardson*, 26 Cal. 149; *Safford v. Navarro*, 15 Tex. 76; *Coghill v. Boring*, 15 Cal. 213; *Rogers v. Weil*, 12 Wis. 663. (5) It was error in the court to exclude the report of the surveyor general to the commissioner of the general land office of January 30, 1855. Although it may be hearsay, yet the latter is admissible to establish the boundaries of land of individual proprietors. *Boardman v. Reed*, 6 Pet. 328; *Kinney v. Farnsworth*, 17 Conn. 363; *Higley v. Bidwell*, 9 Conn. 447; *Wooster*

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v. Butler, 13 Conn. 316; *Tasser v. Herring*, 3 Devereux 340; *Van Deusen v. Turner*, 12 Pick. 532; *Fall Co. v. Worster*, 15 New Hamp. 437; *Smith v. Powers*, 15 New Hamp. 564.

Collins & Jamison for appellants.

(1) The lands claimed by defendants come within the definition of a common field lot as declared by the Supreme Court of Missouri and of the United States. *Page v. Scheibel*, 11 Mo. 183. (2) The lands claimed by appellants being common field lots, were all confirmed by the act of June 13, 1812, *proprio vigore*, and neither confirmation certificate, survey, nor other documentary proof is necessary to establish the title to such land under said act. *Milburn v. Hardy*, 28 Mo. 514; *Glasgow v. Lindell's Heirs*, 50 Mo. 60; *Glasgow v. Baker*, 72 Mo. 441; *Guitard v. Stoddard*, 16 How. 494; *Milburn v. Hortiz*, 1 Black, 595. (3) The evidence introduced by appellants being uncontroverted, and the circuit court having found as a fact, that all of the land sued for lies within the out boundary lines of the great prairie common field of St. Louis, all of which was prior to twentieth of December, 1803, by inhabitants of the town of St. Louis, inhabited, cultivated or possessed as continuous, contiguous common field lots, the circuit court erred in finding for plaintiff. *Glasgow v. Lindell's Heirs*, 50 Mo. 60; *Glasgow v. Baker*, 72 Mo. 441. (4) The evidence as to inhabitation, cultivation, possession and boundaries, being the identical evidence introduced upon the two former trials of this case, and having by the Supreme Court of Missouri been adjudged sufficient, not having been disputed or controverted by plaintiff, is conclusive upon him. *Glasgow v. Lindell's Heirs*, 50 Mo. 60; *Glasgow v. Baker*, 72 Mo. 441. (5) The fact that the common field lots claimed by defendants, are excluded by the out boundary traced upon the map read in evidence by

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plaintiff, does not confer any title upon plaintiff. *Milburn v. Hortiz*, 1 Black, 595. (6) The evidence introduced by defendants was sufficient to establish a title outstanding, and plaintiff not having proved that he was the only person entitled to the land sued for, he never having been in possession, the court below erred in finding for the plaintiff. R. S., Mo. (1879) p. 373, sec. 2240; *Beal v. Hammon*, 38 Mo. 435; 2 Greenl. Evid., sec. 303; Adams on Eject. 33; *Glasgow v. Lindell's Heirs*, 50 Mo. 60; *Glasgow v. Baker*, 72 Mo. 441. (7) The defendants, as above, conclusively proved that all of the land sued for was, by the act of 1812, confirmed as common field lots, and there is no evidence tending to prove any abandonment of any of these lots. *Page v. Scheibel*, 11 Mo. 167; *Glasgow v. Baker*, 72 Mo. 441. (8) Even had plaintiff established that any of these lots had been abandoned by the grantors under the act of 1812, this fact would not entitle plaintiff to recover. *Glasgow v. Baker*, 72 Mo. 441. (9) The circuit court erred in declaring that the surveys of common field lots, introduced in evidence, were not *prima facie* evidence of the locations of the lots surveyed. *Soulard v. Allen*, 18 Mo. 591; *Milburn v. Hardy*, 28 Mo. 514; *City v. Toney*, 21 Mo. 243. (10) The Supreme Court of Missouri has twice declared that the sixteenth section cannot interfere with the common field lots confirmed by the act of 1812, and that the only question left in the case was whether the Lindell heirs had accepted the surveys of some of those lots made nine arpents and thirty-six feet west of the true front line, and the plaintiff having upon the last trial abandoned that defence to defendants' title, the court below erred in finding for plaintiff. *Glasgow v. Lindell's Heirs*, 50 Mo. 60; *Glasgow v. Baker*, 72 Mo. 441. (11) The court below erred in holding that the survey of the Laroche lot was void, because embracing two in place of one arpent in width. *Milburn v. Hardy*, 28 Mo. 514.

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John Flourney and *B. A. Hill* also for appellants.

M. L. Gray and *J. D. S. Dryden* for respondent.

(1) The survey of section sixteen of township forty-five, range seven, east, by the United States, specifically locating said section by metes and bounds identified by the evidence in the cause, of which the land in controversy is part, the act of congress of March 6, 1820, and the ordinance of the people of Missouri, of July 19, 1820, and the act of the legislature of Missouri of March 3, 1851, and the order of the county court of 1853, constitute a *prima facie* right and title in the plaintiff to recover the land sued for. Act of congress, March 6, 1820 (R. S., 1825, p. 37, sec. 6); Ordinance of Convention, of July 19, 1820 (R. S., 1825, 40); Act of Legislature of Missouri, of March 3, 1851 (Session Laws of 1851, 706); *Glasgow v. Baker*, 50 Mo. 78; s. c., 72 *Id.* 443; *Payne v. St. Louis County*, 8 *Id.* 477; *State v. Ham*, 19 *Id.* 592; s. c., 18 How. (U. S.) 126. (2) The town schools derived no rights to the lands in dispute by the act of congress of the thirteenth of June, 1812. The reservation by that act for the use of the schools of the town is by the terms of the act restricted to the lands lying inside the outboundary which the first section of the act required the principal deputy surveyor to run. Act of June 13, 1812 (2 U. S. Stat. at Large, 750); Act of May 26, 1824 (4 U. S. Stat. at Large, 66). The required survey of the outboundary was duly made by the proper officer, and is shown by a map in evidence called map X; but the lands in dispute are not within it, but outside and beyond it. The survey represented by map X has been irrevocably fixed by the United States as the outboundary required by said act of 1812, by the decision of the commissioner of the general land office, affirmed on appeal by the Secretary of the Interior. And the courts

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have always held accordingly. *Trotter v. Schools*, 9 Mo. 69; for instructions nine and twelve, see page 78, and for opinion, 84-5; *Eberle v. The Schools*, 11 *Id.* 247; *Kissell v. Schools*, 16 *Id.* 553; s. c., 18 How. (U. S.) 28. But even if the land in dispute, being vacant land, was reserved by the first section of said act of June 13, it was but a reservation, and not a grant; the property remained the property of the government and subject to any disposition the government might see fit to make of it. *Hammond v. Schools*, 8 Mo. 73-4; *Eberle v. Schools*, 11 *Id.* 262, 264; *State v. Ham*, 19 *Id.* 601. (3) The survey of a common field lot, confirmed under the act of June 13, 1812, which purports to be made in accordance with the calls and boundaries mentioned in the confirmation, is *prima facie* evidence of the true location of the lot confirmed; but a survey that does not purport to be made in accordance with such calls and boundaries is not *prima facie* or any evidence of such location. And under the evidence the trial court correctly decided the law as applicable to the surveys in evidence. *Glasgow v. Baker*, 50 Mo. 80; *Vasquez v. Ewing*, 42 *Id.* 256, *et seq.*; *Blumenthal v. Roll*, 24 Mo. 115; *Clark v. Hammerle*, 36 *Id.* 637. (4) The certificate of recorder Renard, issued to Laroche's legal representatives in 1857, is a nullity. *Gamache v. Piquignot*, 17 Mo. 310; s. c., 16 How. 451. (5) Bizet was a confirmation under the act of July 4, 1836, and a junior title to that of plaintiff. *DeLaurrier v. Emerson*, 14 Mo. 37; s. c., 15 How. 525; *Les Bois v. Brammel*, 4 How. 449; *Sigerson v. Dent*, 29 Mo. 489; *Kennett v. Cole County*, 13 Mo. 139; *Menard v. Massey*, 8 How. 293. (6) The *ex parte* affidavits taken before recorder Hunt and surveyor Cozens, and put in evidence by the defendants, were incompetent as evidence, beyond the effect that the court gave them. *Gamache v. Piquignot*, 17 Mo. 324; *City v. Toney*, 21 Mo. 255-6; *Clark*

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v. Hammerle, 36 Mo. 639; s. c., 27 Mo. 71; *Williams v. Carpenter*, 28 Mo. 461. (7) There is no such thing as a confirmation under the act of June 13, 1812, *en masse*, but only to known and ascertained persons, and of a definite and ascertained lot. Act of June 13, 1812, 2 U. S. Stat. at Large, 748; Act of May 26, 1824, 4 U. S. Stat. at Large, 65; *Hammond v. Coleman* (not reported); s. c., 4 Mo. App. 315; *Glasgow v. Baker*, 50 Mo. 81; *Guitard v. Stoddard*, 16 How. 493; *Glasgow v. Hortiz*, 1 Black, 595; *Page v. Scheibel*, 11 Mo. 167, 183; *Landes v. Perkins*, 12 Mo. 238; *Byron v. Sarpy*, 18 Mo. 455; *Gamache v. Piquignot*, 17 Mo. 310; *Vasquez v. Ewing*, 42 Mo. 248; *Papin v. Hines*, 23 Mo. 277; *Glasgow v. Baker*, 72 Mo. 441; *Tayon v. Ladew*, 33 Mo. 208. (8) The mere fact that the land in dispute lay within the exterior limits of the common fields of the Grand Prairie of St. Louis was no obstacle to the plaintiffs' title attaching under the act of Congress of the sixth of March, 1820, provided the disputed premises were at that time vacant land. Act of Congress of thirteenth of June, 1812, sec. 2, *supra*; act of congress May 26, 1824, sec. 1, *supra*; act of Congress of fifteenth June, 1864 (13 U. S. Stat. at Large, 132); act of Congress, thirtieth of June, 1864 (13 U. S. Stat. at Large, 581); act of Congress, twenty-first of March, 1866 (14 U. S. Stat. at Large, 12); *Hammond v. Schools*, 8 Mo: 65; *Eberle v. Schools*, 11 *Id.* 247; Vacancies 260; *State v. Ham*, 19 Mo. 592; s. c., 18 How. 126; *Glasgow v. Baker*, 50 Mo. 67, and 79; *Hammond v. Coleman* (unreported opinion of supreme court in 1878, by Napton, J.) (9) The case as made by the evidence is insufficient to sustain the defence of outstanding title. *McDonald v. Schneider*, 27 Mo. 405; *Greenleaf's Lessee v. Birth*, 6 Pet. 312; *Peck v. Carmichael*, 9 Yerg. 325; *Vasquez v. Ewing*, 42 Mo. 256-8; *Glasgow v. Baker*, 50 *Id.* 73-79; *Totten v. James*, 55 *Id.* 496-7. (10) The grant of the

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sixteenth section to the state is not a gratuity, as supposed by the other side, but is a grant for a valuable consideration. *Payne v. St. Louis County*, 8 Mo. 476-8; *State v. Ham*, 19 Mo. 601. (11) The alleged previous judgments in this case as to the Laroche tract are no bar; (a) there are no such judgments (b) if there were any such they were nullified by subsequent reversals. Freeman on Judgments, secs. 333, 481, and cases there cited; Bigelow on Estop. (3 Ed.) p. 29, and note 1; *Green v. Stone*, 1 Harris and J. 409; *Duprey v. Robuck*, 7 Ala. 486; *Wood v. Jackson*, 8 Wend. 9-36; *Smilh v. Frankfield*, 77 N. Y. 414. After the reversal of an erroneous judgment, the parties have the same right in the lower court as they originally had. *Stearns v. Aguirre*, 7 Cal. 448; *Phelan v. San Francisco*, 9 Id. 16; *Argenti v. San Francisco*, 60 Id. 462; *Simmons v. Price*, 18 Ala. 407. The utmost that can be claimed for the former trials is, that on one of the trials there was a verdict for the defendants as to so much of the land sued for as is comprehended in Laroche; but no judgment for defendants thereon. A mere verdict without judgment thereon does not work an estoppel. Bigelow on Estop. (3 Ed.) 33; *Webb v. Buckalew*, 82 N. Y. 555; *Easton v. Pickersgill*, 75 Id. 599; *Diggs v. Pursell*, 74 Id. 377; *Dwight v. St. John*, 25 Id. 203. There can be but one final judgment under our law. R. S., secs. 3603, 3679; G. S. of 1865, p. 680, sec. 8. The reversal of a final judgment destroys the judgment in its entirety. *Dickerson v. Chrisman*, 28 Mo. 134, 141. (c) Said pretended judgments were not plead, nor put in evidence, and were neither considered nor passed on by the trial court, and they formed no part of the record herein, and they should be wholly disregarded. R. S., 1879, sec. 3521. (d) The case was tried upon the theory that the defendants' rights to the property supposed to be affected by the pretended recovery was an open question and to be determined ac-

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ording to the rights of the parties plaintiffs and defendants, as they existed at the beginning of the suit; and the defendants, by their answer, and by what happened on the trial and after the trial, abandoned the pretended defence of former recovery. *Leabo v. Goode*, 67 Mo. 133. (12) Instructions should be considered and construed in their combination and entirety. *McKeon v. Citizens, etc.*, 43 Mo. 407; *Moore v. Mo. Pacific Railroad Co.*, 73 *Id.* 438; *Noble v. Blount*, 77 *Id.* 240. And if thus considered and construed, they are found to contain a fair exposition of the law as applicable to the facts of the case, the verdict will not be disturbed by reason of the refusal of other instructions which in themselves were unobjectionable. *Leabo v. Goode*, 67 Mo. 131; *State v. Wissmark*, 36 *Id.* 592; *State v. Walton*, 74 *Id.* 270, 285.

BLACK, J.—The plaintiff claims title to the premises in dispute by act of congress of the sixth of March, 1820, for the admission of Missouri into the union; the act of the general assembly of March 3, 1851, and an order of the county court of St. Louis county of the eleventh of April, 1851, made pursuant to that act, appointing the plaintiff and two other persons commissioners to take possession of and sell the sixteenth section, township forty-five, range seven, east. The defendants claim title from owners or alleged owners of Grand Prairie common field lots under the act of congress of June 13, 1812, making further provisions for settling the claims to land in the territory of Missouri; and the defendant also sets up such claims as an outstanding title.

This is one of several suits commenced in 1853 by these commissioners. It has been here twice before on appeals, prosecuted by the defendants or their ancestors. The other suits were determined years ago in this and the Supreme Court of the United States in favor of de

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fendants. The evidence in this case is now substantially the same as it was when the case was here on the first appeal (50 Mo. 60). It was then stated at length and need not be again repeated.

The record now contains an admission that all of the land claimed on the trial lies within the limits of Grand Prairie common field of St. Louis.

It is the long and well-settled construction of the act of congress of June 13, 1812 (2 U. S. Statutes at Large, 748), that the act, by the force of its own terms, vested in each inhabitant of the then village of St. Louis the title in fee to the common field lot which he possessed or cultivated prior to December 30, 1803, the date of the cession from France to the United States. It confirmed to such inhabitant the lot so possessed or cultivated without any conditions of survey, and without any other or further proof of title derived from the Spanish or French governments than that of inhabitancy and cultivation or possession.

By the first section of the act of 1812 it was made the duty of the principal deputy surveyor to survey the out boundaries of the village so as to include the out lots, common field lots and commons, and to make a plat of such survey. The second section provides that all town or village lots, out lots, or common field lots, included in such survey, which are not rightfully owned or claimed by any private individuals, or held as commons, or that the president shall not reserve for military purposes, "shall be and the same are hereby reserved for the support of schools in" the village, the quantity reserved for such school purposes, however, not to exceed the one-twentieth part of the whole land included in the general survey of the village. By the act of congress of May 24, 1824 (4 U. S. Stat. at Large, 65), it was made the duty of these individual claimants of village lots, out lots and common field lots, "to designate their lots by proving before the recorder of land titles," within eighteen months, "the fact

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of such inhabitation, cultivation or possession, and the boundaries and extent of such claims, so as to enable the surveyor general to designate the private from the vacant lots."

Although this sixteenth section was surveyed as far back as 1818, yet the surveyor general failed to survey and make a plat of the out boundaries of the village, as directed by the act of 1812, until 1840, and when he did then make the survey and plat he did not include in such survey and plat, but excluded the Prairie Des Nowyer, Cul de Sac and Grand Prairie common fields.

The common field lots here in question were not included in that survey and map, known as map X of 1840. The portions of these common field lots recovered by the plaintiffs in this suit in the circuit court are also within the boundaries of this sixteenth section. It is a well established law that the confirmer under the act of 1812, by complying with the act of 1824, secured a recognition of his boundaries, but there could be no forfeiture by reason of his failure so to do. He still held the title by force of the act of 1812. *Page v. Scheibel*, 11 Mo. 167; *Milburn v. Hardy*, 28 Mo. 514; *Guitard v. Stoddard*, 16 How. 494; *Glasgow v. Hortiz*, 1 Black, 595.

Nor did the failure of the surveyor general to include in the survey of 1840 these common field lots affect the rights of the owners or confirmer of such common field lots so excluded. *Glasgow v. Hortiz*, 1 Black, 595; *Milburn v. Hortiz*, 23 Mo. 336; *Tayon v. Hardoman*, 23 Mo. 539; *Schultz v. Lindell*, 24 Mo. 567.

Thus far the law is well settled. Much was said on argument as to a confirmation *en masse* by the act of 1812, without regard to individual claimants, or, as we understand the claims, that the common field was confirmed in a body. It is supposed some countenance is given to this view of the case in the opinion of the court on the second appeal. 72 Mo. 441. We find nothing in any of the vast number of cases which have arisen under

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this act which leads to such a conclusion. The evident purpose of the act was, so far as these common field lots are concerned, to confirm to each inhabitant the particular lot which he possessed or cultivated, and to reserve for the purposes stated in the act the lots not rightfully owned or claimed by individuals. Judge Napton, who pronounced the judgment of this court on the second appeal, was thoroughly conversant with these titles and participated from an early day in giving to these statutes the construction and application before mentioned.

It must be borne in mind that the evidence, then, as now, considering the long lapse of time, was of the strongest character, to the effect that these common field lots now in question had a common or continuous east and west end boundary, well defined by Spanish monuments, a width of from one to two, and a length of forty arpents, all lying contiguous, and that they had been cultivated or possessed, prior to 1803, by those to whom they were surveyed under the act of 1824. On this state of facts it is evident there was no title in the United States which they could vest in the state by the act of 1820. The question of side boundaries might be a matter of consequence as between those claimants, but upon that state of facts would be a matter with which the plaintiff could have no concern. It was then contended that the defendant and those lot claimants were bound by the survey of 1857, which removed those lots some nine arpents to the west, so that they did not interfere with the 16th section, but it was held they were not estopped from claiming under the survey made in 1855, which the evidence abundantly showed was the true and correct survey, the one which conformed to the true boundaries of the common field. It was then said: "No pretension is made that the sixteenth section could interfere with the common field lots confirmed by the act of 1812, since that act disposed of them all."

It was also in substance stated that portions of these

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lots may have been abandoned by those who cultivated them, but that the abandoned lots would by this act go to the village schools, not to these commissioners, and the plaintiff had no right on that ground, and vacancies, such as sink holes would go to the government for military purposes, and hence it was also said, "the material and controlling question was whether the land was within the limits of the common field lots; for, if it was, it was plain the sixteenth section could not interfere with such title."

It does not appear to be now as then contended that the defendants are bound by the survey of 1857 of these lots, but the admission is in that respect, as before stated, that the property in dispute lies within the Grand Prairie common field, and the correctness of the survey of 1855, as to the proper location of the east ends of the lots, is not disputed as we understand the record.

It is, however, now insisted by the plaintiff that the sixteenth section may interfere with these common field lots and attach to such of them as were not rightfully owned and claimed by individuals, and, hence, that the plaintiff is in a position to dispute the validity of the claims set up under Laroche, Bouis, Baccanne and Bizet, and further to show that there is no title outstanding in them. The instructions, as a body, are based upon the theory that the sixteenth section may and does attach to the lots not rightfully owned or claimed by individuals, if any such there are within its boundaries. It would seem to be proper to dispose of this question and it will, therefore, be considered.

As we have seen by the second section of the act of 1812, all common field lots included within the out-boundary survey, as directed to be run by the act of 1812, and not rightfully claimed by any individual, and not reserved by the president for military purposes, were reserved for the support of the schools of the village, not exceeding one-twentieth of all the

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land included in such out boundary. Thus the matter stood until the act of 1820. The language of that act is "that section numbered sixteen in every township, and when such section has been sold, or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the state for the use of the inhabitants of such township for the use of schools." In order to show that the act of 1820 may apply to the lots in question, evidence is offered which shows that long after the false out boundary of 1840 had been made, and in 1853, the schools applied to the commissioner of the general land-office to have this boundary corrected and run in accordance with the act of 1812, which application was refused, and that ruling was approved on an appeal to the Department of the Interior. It also appears that there has been set apart to the schools the one-twentieth of the land within the out boundary as made in 1840, and the title to the land so set apart was vested in the schools by the act of July 27, 1831. (4 U. S. Stat. at Large, 1435). As the schools could not go beyond this survey of 1840, and as that did not include these common fields as it should have done, it follows that the schools have been deprived of much property. The schools, therefore, not at this late day being able to recover this property, it is claimed the sixteenth section may attach thereto. Now, if this is a correct view of the case, then the plaintiff acquired the property in suit, and he comes to the title because of the failure of the surveyor general to perform his duties, or, perhaps, as intimated, because the schools assented to the false out boundary. The plaintiff's title must then have been contingent from the start and depended upon the conduct of these officers and the schools, for, by the acts of 1812 and 1824, it remained to the government by its officers to ascertain and set apart to the schools the particular parcels of property reserved for them. If a

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true out boundary had been made, all of these common fields would have been considered in determining the aggregate amount going to the schools, and the abandoned lots would have constituted a part of the reserved property, certainly so until the one-twentieth was ascertained.

We cannot come to the conclusion that the act of 1820 was designed to take effect and operate in this way. By it, where the sixteenth section had been sold or otherwise disposed of, ample provision is made for an equivalent elsewhere. In construing these acts of congress we must endeavor to look to them as of the date of their passage, and in the light of the then history of the legislation upon the same subject and condition of the subject matter before congress. Congress could not have contemplated in 1812 or in 1820 that the surveyor general would thus fail to cause to be made a true out boundary, and certainly such a thing was not contemplated in 1824.

It is quite true that a reservation does not amount to a grant, and that the title to the abandoned common field lots remained in the government subject to any disposition it saw fit to make of them, but they had been reserved for a defined and specific purpose, and we are not at liberty to presume a purpose on the part of congress to divert that disposition, and we find nothing in the act of 1820 which requires us to give to it that construction, or which leads to a conclusion that it was designed thereby to divert the former disposition of the abandoned lots. We conclude the sixteenth section grant was not designed to, and that it did not, invade these common field lots, recognized as such prior to 1803. Upon this record the plaintiff has no title to them, and the judgment should have been for the defendant.

Besides this, as the plaintiff's title, if he has any, must come to him subject to the prior right of the

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schools, and as their rights were in a measure subject to the acts and conduct of the surveyor general, the plaintiff is not in the most favorable position to dispute the claims of the persons to whom the property was surveyed by specific boundaries because cultivation and inhabitaney proved to the satisfaction of the recorder of land titles. It in any event devolved upon him to show affirmatively that the claimants, Laroche, Bouis, Baccanne and Bizet, did not possess or cultivate their respective parcels, and such proof was necessary to overcome the documentary evidence. But as the cause is disposed of on other grounds, we need not enter into a consideration of the title of defendants. We have not overlooked the act of congress of June 15, 1864 (13 U. S. Stat. at Large, 132), by which the United States granted to the state all of their right and title in and to all the parcels of land within the Grand Prairie common field, in township forty-five, for the support of schools in that township. It does not aid the commissioners acting under the act of the general assembly of 1851. This suit was commenced in 1853. The judgment is reversed. All concur.

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COCK V. STEWART *et al.*, County Judges, Appellants.

Constitution : RAILROAD TAX : STATUTE. Section 32, page 427, Revised Statutes, 1855 (R. S., 1865, chap. 63, sec. 19), which provided that: "If any of the taxpayers in any county or city in which a railroad tax shall be levied, shall have subscribed in good faith to the capital stock of any railroad to which the county shall have subscribed, the said taxpayers shall be entitled to a deduction on the amount assessed against them respectively, in proportion to the amounts of their *bona fide* subscriptions, until the amount of such credits or deductions shall equal the amount of their subscriptions, after which they shall be subject to pay their railroad tax as other persons," was repugnant to the provisions of the constitution of 1865, and hence invalid under that instrument.

Appeal from Henry Circuit Court. — HON. F. P. WRIGHT, Judge.

REVERSED.

C. B. Wilson for appellant.

(1) The statute under which the exemption from the taxation is claimed is unconstitutional and void. *Life Association v. Board of Assessors*, 49 Mo. 512; *Weeks v. Milwaukee*, 10 Wis. 242. (2) The adoption of the constitution of 1865, article 11, section 16, rendered the statute in question void. *Ramsay v. Hoeger*, 6 Chicago Legal News, 318; *Hills v. Chicago*, 60 Ill. 86. (3) The statute is in violation of the spirit, if not of the letter, of the bill of rights of constitution of 1820: "No private property ought to be taken or applied to public use without just compensation;" see, also, section 16, Bill of Rights of Constitution, 1865, and that even where the constitution is silent the legislature is not omnipotent in its power to tax—that in the very nature of things there must be, and is a limit to the power of the legislature over the people's money as well as their lives; that it has

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no power to take the money of one man and give it to another. Pot. Dwar. on Stat. and Const. 402; Cooley on Const. Lim. 490, 1, 2, 3, and 4; *Wells v. The City of Weston*, 22 Mo. 384; *Sharpless v. Mayor, etc.*, 21 Pa. 168; *Broadhead v. Milwaukee*, 19 Wis. 652; *Weeks v. Milwaukee*, 10 Wis. 242; 16 Mich. 269; *The People v. Salem*, 20 Mich. 452 (4 Amend. 400); *In the matter of Albany Street*, 11 Wend. 149; *Bloodgood v. M. & H. Ry. Co.*, 18 Wend. 56; *Taylor v. Porter*, 4 Hill, 140; *Powers v. Bergen*, 2 Seld. 367.

M. A. Fyke also for appellants.

The legislature has no power to take stock in railroads for counties, nor to compel counties to do so, much less has it power to confer authority on a few individuals to do so. The direct effect of section 19 of Revised Statutes, 1865, chapter 63, is to enable individuals to force upon counties a double subscription, thereby evading the provisions of section 14, of article 11, of our constitution. Section 19 is, therefore, unconstitutional and void. See case of *Ramsey v. Hoeger*, Supreme Court of Illinois, 1874; 6 Chicago Legal News, 318, June 27, 1874. The legislature had no power, under the constitution as it existed in 1866, to exempt property from taxation, or to commute the payment of taxes. *The Life Association of America v. The Board of Assessors of St. Louis County*, 49 Mo. 512.

HENRY, C. J.—In 1873 plaintiff was collector of taxes for Henry county. In 1870, Henry county subscribed for capital stock in the Tebo & Neosho Railroad Company to the amount of \$400,000, for which she issued her bonds. P. A. Ladue, R. Allen, and A. C. and J. M. Avery, also subscribed for capital stock of said company, which issued to them certificates therefor. When the collector demanded of them their taxes they presented their said certificates of stock, and demanded to have the amount

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of their railroad tax levied to pay the above indebtedness of the county endorsed on the back of said certificates, which the collector did, and when he made his settlement with the county court the court refused to allow him credit for said sums, aggregating \$488.11, of which amount \$204.83 represented the taxes assessed against A. C. Avery; \$131.11, the amount of taxes assessed against J. M. Avery; \$127.25, the taxes assessed against R. Allen, and \$24.73, the taxes assessed against Ladue. This action is to compel the county court to receive as vouchers from the collector his receipts from the above named parties for the amount above named, credited on their stock certificates. On a hearing of the cause there was a judgment for plaintiff, from which defendants have appealed.

The plaintiff bases his right to have the receipts credited to him upon section 32, page 427, Revised Statutes of 1855, which is in substance that if any taxpayers in any county in which a railroad tax shall be levied shall have subscribed in good faith to the capital stock of any railroad to which said county shall have subscribed, the said taxpayers shall be entitled to a deduction on the amount assessed against them respectively, in proportion to the amounts of their *bona fide* subscriptions until the amount of such credits shall equal the amount of their subscriptions, after which they shall be subject to pay their railroad tax as other persons. By the thirtieth section of the same act county courts were authorized to subscribe to the capital stock of railroad companies without a vote of the taxpayers. The subscriptions made by the Averys, Ladue, and Allen, were made while the act of 1861 was in force, which repealed section 32 of the Revised Statutes of 1855, *supra*, by the following provision: "Section 3. No person shall be exempt from the payment of his pro rata share of any tax levied by the county court." By the same act, section 2, it was provided that, "It shall not be lawful for the county court

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of any county to subscribe to the capital stock of any railroad company, unless the same has been voted by a majority of the resident voters who shall vote at such election under the provisions of this act." Section 3 of the act of 1861 was omitted from the revision of 1865, but the substance of section 2 of the act of 1861 will be found in section 17 of that revision (General Statutes, page 338), and section 19 of that revision, page 338, re-enacts section 32 of the Revised Statutes of 1855, page 427.

The law on the subject having been revised in 1865, section 3 of the act of 1861, by being omitted, was repealed, and by section 19, the law of 1855, authorizing what is here claimed for individual subscribers for capital stock of a railroad company, was re-enacted. The subscriptions to the capital stock of the railroad in question by the individuals above named were made in 1866. By the constitution of 1865 the general assembly was prohibited from authorizing "any county, city, or town, to become a stockholder in, or to loan its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such city or town, at a regular or special election, to be held therein, shall assent thereto."

Section 30, article 1, declares: "That all property subject to taxation ought to be taxed in proportion to its value." If section 19 of the General Statutes of 1865, *supra*, authorizing individual subscribers to the capital stock of a railroad company to pay the railroad taxes assessed against them, by giving credits upon their stock certificates for the amount, can be upheld as constitutional the judgment must be affirmed. But that section is so manifestly unjust in its operation that we should give the constitution and the act the closest scrutiny before we declare them in harmony with each other. In the first place, the individual subscribers pay for their stock and get their certificates, and are then reimbursed

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by the county. In other words, the taxes legally assessed against them, they are permitted to pay by crediting the amounts on their stock certificates, until the credits equal the amount subscribed by them respectively. The manifest result is that the other taxpayers refund to them the amounts they have severally paid for their stock. It virtually authorizes one man to subscribe for stock and get a certificate for it for his own benefit, and then compels the balance of the taxpayers to pay him the amount of money he paid for his stock. If a tax to raise \$50,000 is levied upon all the taxable property of the county, and the tax upon any portion of that property is not collected in money, but is credited upon stock certificates, so much of that burden is cast upon the balance of the taxable property. It amounts to an exemption of that property from taxation which "ought to be taxed in proportion to its value." It was a virtual exemption of that property from taxation, because levying the tax and then in effect giving it to the party against whom it is assessed, is not a compliance with the constitutional provision requiring all property to be taxed in proportion to its value.

We can conceive of no principle upon which such legislation can be upheld. Again, it is evasive of the constitutional inhibition against the subscription to the capital stock of a corporation by the county without submitting the question to a vote of the people. The county had subscribed for \$400,000 of the capital stock when no such vote was required. After it was required, individuals of the county are authorized to subscribe for an equal or greater amount, and virtually exempted from taxation for the interest of the former indebtedness of the county, and the amount of taxes their property would pay of that interest is imposed upon the balance of the taxpayers of the county. The constitution of 1865 became the organic law of the state July 4, 1865. The laws revised in 1865 took effect August 1, 1866, nearly one

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year after the constitution took effect. When the individuals above named subscribed for the stock in the railroad company, the act of 1861, repealing the act exempting them from paying their taxes in money, and allowing them to be credited on their certificates was in force. The revision of 1865 re-enacted the act so repealed, but it was in conflict with the constitution of 1865. These views were substantially held by the Supreme Court of Illinois in *Ramsay v. Hoeger*, 6 Chicago Legal News, 518.

We are all of the opinion, for the above reasons, that the judgment should be, and it is accordingly reversed, and the petition dismissed.

BETTES *et al.* v. MAGOON, *Appellant*.

1. **Practice in Supreme Court.** Where a cause is tried upon a theory adopted by both parties at the trial, the judgment will not be reversed on the ground that such theory was erroneous.
2. **Husband and Wife: STATUTE.** Under Revised Statutes, section 3296 (*Ibid.* Acts 1875, p. 61), a husband can make a gift to his wife of personal property without the aid of a trustee or writing evidencing the gift, and without declaring the gift to be for her sole and separate use.
3. **Evidence.** Insuring property in one's name is admissible in evidence to show that the insured managed and controlled it as her own.
4. **Documentary Evidence: BILL OF EXCEPTIONS.** Where error is complained of in the admission in evidence of written documents, such documents, or so much thereof as relate to the point of objection, should be preserved in the bill of exceptions.

Appeal from Johnson Circuit Court.—HON. N. M. GIVAN, Judge.

AFFIRMED.

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S. P. Sparks for appellant.

(1) The court erred in permitting the plaintiff to read in evidence the policies of insurance issued to her on the property in controversy; being in the nature of her declaration of ownership, were inadmissible. *Farmer v. Belden*, 9 Mo. 787; *Hambright v. Brockman*, 59 Mo. 57; *Watson v. Bessel*, 27 Mo. 220; 54 Mo. 419. (2) The bulk of the property in suit being personalty in possession, became that of her husband absolutely, by operation of law, long before the enactment of section 3296. The court erred in refusing defendant's instructions three and four. *Polk v. Allen*, 19 Mo. 467; *Walker v. Walker*, 25 Mo. 307; *Hockaday v. Sallee*, 26 Mo. 219; *Kelly's Married Women*, 63. (3) Section 3296, being wholly prospective in its operations, did not divest the title thus acquired by the husband, nor could it without being retroactive and unconstitutional. *Frye v. Kimball*, 16 Mo. 9; *Routson v. Wolf*, 35 Mo. 124; *A. & P. R. R. Co. v. St. Louis*, 66 Mo. 228; *Ex parte Bethurem*, 66 Mo. 545; *Williams v. Courtney*, 77 Mo. 588. (4) Plaintiff's contention is that the title to none of the property vested in the husband *jure mariti*, but remained in the wife by virtue of his and her acts and conduct respecting it, subsequent to its acquisition, so that the instruction given by the court of its own motion, submitting the theory of a gift from the husband to her after it became his, was erroneous, there being no evidence to warrant it. (5) Conceding that the husband could have taken the property into his possession with the intention of not reducing the same, and that his possession in such case would not be a reduction, but to overcome the presumption of law, and convert the husband into a trustee of the wife, the evidence must be clear and conclusive. His subsequent conduct would be wholly insufficient to establish its existence at the time

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of the acquisition. *Holthaus v. Hornbostle*, 60 Mo. 442; *McCoy v. Hyatt*, 80 Mo. 130; 2 Story Eq. Juris., secs. 1381, 1382 (Ed. 1870). (6) A gift of a personal chattel by a husband to his wife is void at law, on account of the unity of husband and wife. The possession of the wife is the possession of the husband, and the transfer of the possession, which is essential to a gift, is prevented. To be upheld in equity, proof of the gift must be clear and conclusive. 2 Kent Com. 438; 1 Bell H. & W. 466; *Beard v. Beard*, 3 Ark. 72; *Casswell v. Ware*, 30 Ga. 267; *Taylor v. Fire Dep't*, 1 Edw. Ch. 294; 2 Edw. Ch. 333; *Jennings v. Davis*, 31 Conn. 134; *Bradshaw v. Maxfield*, 18 Tex. 21; *Skillman v. Skillman*, 2 Beas. 403; 60 Mo. 442; *McCoy v. Hyatt*, *supra*. Since there could be no delivery of the possession between the husband and wife, a gift to a wife by a husband, without the intervention of a trustee, according to section 2499, Revised Statutes, is void, and the last instruction asked by defendant should have been given.

S. T. White for respondent.

(1) The defendant cannot complain of the theory of the trial court on the rights of married women, either as to their separate property or under section 3296, upon which this case was tried. Under instruction number three, for plaintiff, number one for defendant, and the instruction given by the court, they must have found from the evidence that the property they considered her entitled to had been acquired by her by gift or purchase, with her separate money and means, since March 25, 1875. The only construction this court has given this statute has been in *Rogers v. Pike County Bank*, 69 Mo. 160; *McCoy v. Hyatt*, 80 Mo. 130. (2) The admission of policies of insurance and their renewals from February 2, 1875, was proper as part of the *res gestæ*. 1 Greenl. Evid. (Red. Ed.) secs. 108, 108a, and 109; *State ex rel. Schneider*, 35 Mo. 533; *Davitt v. Donnelly*, 38

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Mo. 482; *Burgert et al. v. Borchert et al.*, 59 Mo. 80. (3) Granting that the evidence did not show a separate estate in Mrs. Bettes, in her own property before March 25, 1875, of a good part of this property it undoubtedly established a gift to her under the statute. *Gentry v. McReynolds*, 12 Mo. 533; *Coughlin v. Ryan*, 43 Mo. 99; *Welch's Administrator v. Welch*, 63 Mo. 57; *Tennison v. Tennison*, 46 Mo. 77. (4) The uncontradicted evidence showed there was a separate estate of all the property in Mrs. Bettes from 1856, and the court should have so declared and ordered the jury to assess damages as requested by plaintiff. *Holthaus v. Hornbostle*, 60 Mo. 442; *Welch v. Welch*, 63 Mo. 57; *Coughlin v. Ryan*, 43 Mo. 99; *Tennison v. Tennison*, 46 Mo. 77; *McCoy v. Hyatt*, 80 Mo. 130.

HENRY, C. J.—This is a suit instituted by husband and wife for recovery of certain personal property specifically described, of which it is alleged the wife is the owner in her own right and that the defendant forcibly took the same from her possession. The trial resulted in a judgment for plaintiffs, from which this appeal was taken. The property was seized and sold under an execution against the husband by a constable, to whom defendant executed an indemnifying bond. The evidence disclosed the following facts: Plaintiffs formerly lived in Canada, and part of the property in dispute was bought by Mrs. Bettes with means which she inherited from her grandfather. This was after the year 1856, when plaintiffs intermarried, but long prior to 1875; part of the property, the husband testified, was purchased with proceeds of a homestead he had given Mrs. Bettes prior to their marriage. That the property was brought from Canada to Holden in this state, in 1866, and that Mrs. Bettes owned and controlled it, since May 1856. He further testified that he had always treated it as hers and that with respect to his property she treated

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with strangers as if it was hers, and continued to do so after 1875, just as she had previously done. He was corroborated by other witnesses, as to Mrs. Bettes' ownership of the property in Canada, and she testified substantially to the same facts testified to by her husband. The property was in a house occupied by plaintiff as a residence and owned by her.

The testimony on the part of the defence was to the effect that H. C. Bettes attended the sale and told the purchaser, Steele, what property to bid for and Steele bid as Bettes directed.

The court, at the instance of plaintiff, gave the following instructions :

"1. The court instructs the jury that the seizure of the property in controversy and the sale thereof under the execution is an actual conversion of the property, and the measure of damages is the actual value of said property at the time of the seizure, with six per cent. interest from said sale."

"2. The court instructs the jury, that the joinder of H. C. Bettes with Mrs. A. T. Bettes is required by law to enable her to sue and protect her rights and that he, by such joinder, is a merely nominal party to this action that the law requires. If the jury find from the evidence that any portion of the property in controversy was acquired by the plaintiff Amanda T. Bettes, either by gift or purchase with her separate means, since the twenty-fifth day of March, 1875, then the jury will find for plaintiff in such sum as they may believe from the evidence was the value of such property at the date of seizure, with six per cent. interest from the sale thereof."

"4. The court instructs the jury, that defendant by signing and delivering the bond, approved in evidence, placed himself in the same position as to Mrs. A. T. Bettes as if he himself had actually made the seizure of the property instead of the officer, and if you find that the property sued for was the property of Mrs. A. T.

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Bettes, you must find against this defendant for the sum that she was damaged by said seizure."

For defendant the court gave the following:

"1. The court further instructs the jury that prior to the twenty-fifth of March, 1875, to constitute a reduction to possession, by the husband, of the personal property or money of the wife it was not necessary that the husband should have actually used and occupied the same, but it was sufficient if such property was in such condition that he could at any time have reduced the same to his possession."

"2. The court instructs the jury that, although they may believe from the evidence in the case that the property in controversy or part of same was, at the time of the levy of the execution and sale thereunder, the separate property of Amanda T. Bettes, yet, if they further find and believe, from the evidence in the case, that such property or any portion of the same, so belonging to said Amanda T. Bettes, was bid in at said sale by her or by anyone for her, then she can only recover as damages as to such portion of the goods so sold the price bid therefor with six per cent. interest from such sale."

Of its own motion the court gave the following instruction:

"The court instructs the jury that if they should believe from the evidence, that any portion of the property in controversy, now claimed as the property of Amanda T. Bettes, was reduced to the possession of her husband, H. C. Bettes, prior to the twenty-fifth day of March, 1875, then such property became the property of her husband and plaintiff cannot recover to that extent unless said Amanda T. Bettes has acquired the same by gift from her husband since that date."

Neither party asked nor did the court declare the law applicable to the testimony of the cause. Both the parties and the court seemed to have regarded as neces-

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sary in order to invest the husband with the title to the personal property of the wife in her possession, except choses in action, that he should have reduced them to his possession, whereas after they intermarried her choses in possession became his by operation of law, whether acquired before or after the marriage. Both parties asked and the court gave instructions to the jury declaring in substance that, whether the husband reduced the chattels in controversy to his possession or not was a material and controlling question in the case, and for this error we cannot reverse the judgment because the case was tried upon the theory submitted both by the defendant and plaintiff.

Although the property was the husband's in Canada and after he removed to Missouri, yet, under the act of 1875, now section 3296, of the Revised Statutes of 1879, he could give her that property without the aid or benefit of the trustee, without a writing evidencing the gift, and without declaring the gift to be for her sole and separate use. The evidence tended to prove that he not only consented in Canada and after their removal to Missouri, prior to 1875, that she should hold the property as her own, but after the act of 1875 was passed, recognized her right to the property, ratifying the gift in every conceivable way, except by a declaration in writing to that effect. No prescribed form is given, for a gift from a husband to his wife. It may be proved in the same manner as a gift between strangers, and taking the testimony adduced by plaintiffs as true, there was a gift to the wife of the property in controversy, continuously recognized from their marriage in 1856 to and after 1875, until the seizure complained of and before there were creditors of the husband whose rights would be prejudiced by such a gift.

The admission as evidence of policies of insurance, issued to Mrs. Bettes on the property, is complained of. The policies are not copied into the bill of exceptions.

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It is difficult to pass upon the admissibility of the document as evidence in its absence. What the policy substantially contained is not stated. All that appears in the bill of exceptions in relation to the matter is that certain policies of insurance and renewals thereof, on the property in controversy and other property, to the value of \$2,000, in favor of Amanda T. Bettes, from the second day of February, 1875, to the second day of February, 1881, were admitted as evidence over defendant's objection that they were irrelevant and incompetent. The plaintiffs had both testified that Mrs. Bettes had always controlled and managed the property as her own. Insuring the property in her own name, like having it assessed for taxes as hers, and paying the taxes, was an actual control and ownership, and admissible on like grounds.

The whole question in this case was whether her husband had relinquished to her his marital rights in the property, and open acts of ownership on that view we think admissible. We would suggest that when objections are made to the introduction of written documents, they, or such part as relate to the point of objection should be preserved in the bill of exceptions. Every presumption is indulged in favor of the rulings of the trial court. While it may be, in the case before us, that the policies were in the name and for the benefit of the wife, it might also appear upon the face of the policy that the husband was also a party to the contract, or was cognizant of and consenting thereto.

The judgment is affirmed. Norton, and Black, JJ., dissent.

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MOORE V. THE WABASH, ST. LOUIS & PACIFIC RAILWAY
COMPANY, *Appellant*.

1. **Fellow Servants.** They are fellow servants, who under the direction and management of the master himself, ~~or of some servant placed by the latter over them,~~ are engaged in the prosecution of the same common work without any dependence upon or relation to each other except as co-laborers without rank.
2. **Vice-Principal.** He is a vice-principal who is entrusted by the master with power to superintend, direct or control the workman in his work, and for negligence in such superintendence, direction or control, the master is liable.
3. ———. The servant of a railway company may rely on the vice-principal's promise to protect him while at work on a side-track, notwithstanding the existence of a rule of the company requiring servants to protect themselves by putting out flags while engaged in such work.

Appeal from Livingston Circuit Court.—HON. JAMES M.
DAVIS, Judge.

AFFIRMED.

W. H. Blodgett and George B. Burnett for appellant.

(1) The court erred in overruling defendant's demurrer to plaintiff's evidence. Kestler, the foreman, was a fellow servant of the plaintiff, and the defendant was not liable for an injury occurring through his negligence, or on account of a failure on his part to keep his alleged promise to protect plaintiff from injury. *Harper v. Railroad*, 47 Mo. 576; *McGowan v. St. L. & I. M. Ry. Co.*, 61 Mo. 528; *Lee v. Detroit Bridge & Iron Works*, 62 Mo. 565; *Marshall v. Schricker*, 63 Mo. 308; *Blessing v. St. L., K. C. & N. Ry. Co.*, 77 Mo. 410; *Hoke v. St. L., K. & N. W. Ry. Co.*, 11 Mo. Ct. App. 574;

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Crispin v. Babbitt, 81 N. Y. 516; *McCosker v. Long Island Ry. Co.*, 84 N. Y. 77; *Slater v. Jewett*, 85 N. Y. 61; *Holt v. Peters et al.*, 55 Wis. 405; *Weger v. P. Ry. Co.*, 55 Pa. St. 460; *Keystone Bridge Co. v. Newberry*, 96 Pa. St. 246; *Johnson v. Boston*, 118 Mass. 114; *O'Connor v. Roberts*, 120 Mass. 227; *Parker v. St. P., M. & M. Ry. Co.* (Minn.) 19 Northwestern Reporter, 349; *Brown v. Winona & St. Peters Ry. Co.*, 27 Minn. 162; s. c., 38 Am. 285; *Mathews v. Case* (Wisconsin) Central Law Journal, Dec. 12, 1884, p. 478. (2) The court erred in giving the first and second instructions on behalf of the plaintiff. (a) Because the instructions erroneously declared that upon the facts enumerated, Kestler and plaintiff were not fellow servants. See authorities *supra*. (b) Because the instructions ignore the evidence as to the rules of defendant, in respect to putting out red flags for the protection of employes, while repairing cars on a track other than the repair track. *Chappell v. Allen*, 38 Mo. 214; *Ellis v. McPike*, 50 Mo. 574; *Raysdon v. Trumbo*, 52 Mo. 35; *Iron Mountain Bank v. Murdock*, 62 Mo. 70; *Sullivan v. H. & St. J. Ry. Co.*, not yet reported; Thompson on Charging the Jury, sect. 71, p. 99. (3) The instructions asked by the defendant correctly declared the law applicable to the evidence, and should have been given.

Waters & Wyne for respondent.

The only questions in this case are: (1) Was Kestler a fellow servant with plaintiff? (2) Was the defendant guilty of negligence in requiring plaintiff to repair the car on its side track, and in failing to protect him while at work? (3) Was plaintiff guilty of contributory negligence? (4) Was any error committed by the court below in giving plaintiff's first and second instructions and in refusing defendant's second, third, fourth, fifth, sixth, seventh, eighth, and ninth? (1) Kestler was defend-

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ant's foreman of car repairs at Stanberry, with power to employ such car repairers as he needed, at such wages as he arranged to pay, and to discharge them at pleasure; and with authority to superintend, control and direct them in their work. He was not a fellow servant with plaintiff. *Granville v. Ry. Co.*, 10 Fed. Rep. 711; *Murphy v. Smith*, 19 C. B. (N. S.) 361; *Brickner v. Ry. Co.*, 49 N. Y. 672; *Moore's Adm'r v. Ry. Co.*, 17 Am. & Eng. Ry. Cases, 531; Woods' Master and Servant, secs. 438, 439, 452, 453; Shear. & Redf. on Neg., secs. 102, 103, 104; *Mann v. Oriental Print Works*, 11 R. I. 184; *Mullan v. Ship Co.*, 78 Pa. St. 25; *Brabbitts v. Ry. Co.*, 38 Wis. 289; *Malone v. Hathaway*, 64 N. Y. 5; Whar. on Neg., sec. 232; *Sullivan v. Mfg. Co.*, 113 Mass. 398; *Ford v. Ry. Co.*, 110 Mass. 240; *Crispen v. Babbitt*, 81 N. Y. 516; Redf. on Rys. (5 Ed.) p. 838, sec. 7; *Ry. Co. v. Ross*, 112 U. S. 377; *Ry. Co. v. May's Adm'r*, 108 Ill. 288; *Ryan v. Bagaley*, 50 Mich. 179; *Chapman v. Ry. Co.*, 55 N. Y. 579; *Ry. Co. v. Little*, 19 Kas. 627; *Ry. Co. v. Decker*, 82 Pa. St. 119; *Smith v. Ry. Co.*, 17 Am. & Eng. Ry. Cases, 561. (2) The defendant was guilty of negligence in requiring plaintiff to repair its car on a side track and in failing to protect him while at work. *Flynn v. Ry. Co.*, 78 Mo. 202; *Mo. Furnace Co. v. Abend*, 107 Ill. 44; *Moore's Adm'r v. Ry. Co.*, *supra*; *Thompson v. Ry. Co.*, 1 Pac. R. 255; *Whalen v. Centenary Church*, 62 Mo. 326; *Gibson v. Ry. Co.*, 46 Mo. 162; *Sullivan v. Mfg. Co.*, *supra*; *Snow v. Ry. Co.*, 8 Allen 441; Wood's M. & S., secs. 351, 439, 448, 450; Whar. on Neg., secs. 235, 219, 220; *Fransden v. Ry. Co.*, 36 Iowa 372; Shear. & Redf. on Neg., secs. 93-96; *Dowling v. G. B. Allen Co.*, 74 Mo. 14; *Porter v. Ry. Co.*, 71 Mo. 66; *Flynn v. Ry. Co.*, *supra*; *Conroy v. Iron Works*, 62 Mo. 35; *Hough v. Ry. Co.*, 100 U. S. 213; *Wedgewood v. Ry. Co.*, 41 Wis. 478; *Ry. Co. v. McLallen*, 84 Ill. 116; Cooley on Torts, 561, 562; *Ry. Co. v. Fox*, 3 Pac. R. 320; *Lubke v. Ry. Co.*, 59 Wis. 127; *Ry. Co. v. Levalley*, 36 O. St.

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221; *Bessex v. Ry. Co.*, 45 Wis. 477. (3) Was plaintiff guilty of contributory negligence? The answer charges that plaintiff made the repairs in question without setting red flags on each side of the place where he was at work, as required by a rule of defendant, and was injured thereby. The foreman ordered plaintiff to make the repairs on the side track and promised to protect him, and obedience on the part of plaintiff is not negligence. *Brothers v. Cartter et al.*, 52 Mo. 374; *Keegan v. Kavanaugh*, 62 Mo. 232; *Flynn v. Ry. Co.*, 78 Mo. 205; *Ry. Co. v. Bayfield*, 37 Mich. 210; *McKinne v. Ry. Co.*, 5 Pac. R. 482. He had a right to assume that defendant would be mindful of his safety. *Bradley v. Ry. Co.*, 62 N. Y. 99; *Mfg. Co. v. Morrissey*, 40 O. St. 148; *Hawley v. Ry. Co.*, 82 N. Y. 370; *Cook v. Ry. Co.*, 63 Mo. 397; 1 Add. on Torts, p. 605, note; *Mo. Furnace Co. v. Abend*, 107 Ill. 44; *Greene v. Ry. Co.*, 31 Minn. 248; *Huddleston v. L. M. S.*, 106 Mass. 282; *Miller v. Ry. Co.*, 12 Fed. R. 600; 2 Thomp. on Neg. 974, 975, 976. Plaintiff swears he never heard of any rule concerning the use of flags, nor of their existence or use. (4) The court did not err in giving plaintiff's first and second instructions. *Brothers v. Cartter et al.*, 52 Mo. 374; *Hicks v. Ry. Co.*, 68 Mo. 329; Whar. on Neg., sec. 235; *Bradley v. Ry. Co.*, 62 N. Y. 99. (5) Defendant's second, third, fourth, fifth, sixth, seventh, eighth and ninth instructions present the converse of the propositions contained in plaintiff's instructions, as given by the court, and were properly refused.

HENRY, C. J.—This is an action to recover damages for an injury alleged by plaintiff to have been sustained by him while in the employ of defendant as a car repairer. The cause of action stated in the petition is, that at Stanberry, a station on defendant's road, defendant kept a car shop, and had in its employ a foreman of car repairs, who had sole charge and control of hands employed to repair cars. That on the nineteenth day of October, 1881, and

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while plaintiff was so employed as a car repairer, the said foreman ordered and directed the plaintiff to repair the draw-head of one of the freight cars of defendant company, then standing with other freight cars upon a side track of defendant, at said town of Stanberry, and while said cars were detached from any engine; that said foreman of car repairs then and there promised plaintiff that he would protect him while so employed in repairing said draw-head, and would prevent and keep away any train or engine from coming in or entering upon the said side track, and plaintiff, in obedience to the order and direction, and relying on the promise of said foreman, undertook to repair the draw-head of said freight car, and while engaged thereat, and being upon the side track of said defendant, and between two of the freight cars of said company, an engine of defendant came in and upon said side track, and against the cars standing thereon, and the car upon which the plaintiff was at work was driven back against the freight cars standing in the rear thereof, and plaintiff's right arm was caught and crushed between said cars; that the said foreman failed and neglected to protect plaintiff while at work on said draw-head, and failed and neglected to prevent and keep said engine from coming upon said side track, and utterly failed and neglected to notify or inform the person in charge of said engine that plaintiff was at work upon the draw-head of said car, upon said side track.

The answer denied every allegation in the petition, and for a further defence alleged, that at and long prior to the date of plaintiff's injury, the defendant had adopted a rule, requiring all car repairers, when engaged in repairing cars, to set out red flags on each side of the place where they were at work, as signals of warning to approaching trains, and that Kestler, the foreman, and the defendant and O'Connor, who was at that time engaged with plaintiff in repairing the car in question, had notice of the rule, but that defendant and Kestler on that

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occasion neglected to observe it, and that the injury was attributable to his own and the negligence of O'Connor, his fellow servant. The replication was a denial of the new matter pleaded in the answer. On the trial plaintiff had a judgment for \$8,450.00, from which defendant has appealed.

It is virtually conceded by plaintiff that no red flags were set out, as required by the rule of the company, but there was evidence tending to prove that plaintiff had no knowledge that such a rule had been adopted. There was evidence, however, tending to prove the facts alleged in plaintiff's petition, and the question in the cause which presents the most difficulty, is whether plaintiff and the foreman of car repairs were fellow servants. If they were not, and the foreman is to be regarded as the *alter ego* of the company in the transaction which is the basis of this action, plaintiff was absolved from the duty of observing said rule by the promise of the foreman to use proper precautions for his safety. Appellant's counsel say that the rule by which to determine who are fellow servants is well stated by Mr. Wood in his work on Master and Servant, at page 860, as follows: "Whenever the master delegates to another the performance of a duty to his servants, which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middle man whom he has selected as his agent, *and to the extent of the discharge of those duties* by the middle man, he stands in the place of the master, *but as to all other matters he is a mere co-servant.*" The cases on this subject, reported in the books, are numerous and contradictory, and it would be an endless task to review, and utterly futile to attempt to reconcile, them.

Whether the foreman, in this case had or had not authority to employ and discharge car repairers, by no

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means determines his relation to the plaintiff at the time the latter was injured. It is asserted in some of the cases that it is a test, but a corporation might adopt a by-law, taking from every officer of the company the authority to employ and discharge hands, and vest it in the board of directors, still leaving with the proper officers the control and direction of the work the hands were engaged to perform. This would not constitute the general manager, or other general officer, a fellow servant of all the men engaged in his department of the service. If the law were otherwise, a railroad corporation would escape liability to its servants in every case, unless it should be proved that the directors had negligently employed the servant whose negligence occasioned the injury, or retained him in the service after learning his unfitness. If we may venture a general proposition on the subject, it is, that all are fellow servants who are engaged in the prosecution of the same common work, leaving no dependence upon or relation to each other, except as co-laborers without rank, under the direction and management of the master himself, or of some servant placed by the master over them. If a person employs another to perform a duty which he would have to discharge if another were not employed to do it for him, such employe, as to that service, stands in the master's stead, with relation to other persons. A railroad corporation impliedly contracts, not only to furnish suitable machinery and appliances for its employes to operate and work with, but to keep them in repair, and the latter duty stands upon no different ground than does its obligation to furnish suitable machinery, in the first instance. When he whose duty it is, as representative of the company, to inspect the machinery, sends any of it to the shop for repair, the company is at once chargeable with notice of its condition, and the foreman, in having it repaired for use, is in the line of his duty.

It is true the company was under no obligation to the

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plaintiff to have the car in question repaired at all. It owed no duty to any one, except servants who were to use it, or passengers or shippers of freight in that car, to repair it, but the repair of the car was the company's business, if undertaken at all. The company being a corporation, could not be actually present, either to make or direct repairs, but, having ordered its repair, it had to be represented by some one or more to do the work, and by some one to determine where, how and when it should be repaired. The person who had control of the work, and of the men engaged in it, directing how, when and where it should be done, represented, in those matters, the company itself. It was the duty, a contractual obligation, of the company to provide for the safety of the men at work in repairing the car. The company devolved that duty upon the person who represented it in conducting, ordering and managing the work, and the men engaged in it. It could not impose that duty upon the car repairers, so as to absolve itself from liability for its own negligence. It might make, as it did, reasonable rules, and impose the duty upon the servants to observe those rules, for their own safety, but could not impose upon them the entire duty of protecting themselves. The foreman, in what he had to do for the company, did not represent himself. Except as the agent of the company, he had no interest in the repair ordered. He did none of the manual labor in repairing the car, but, for the company, gave such orders and directions to the car repairers as he thought proper. That the foreman was an inferior servant to Buck, who had a general control and management of car repairs everywhere along the line of the road, does not determine that the foreman was a fellow servant of plaintiff.

In some of the cases and text books the rule is announced that, where a master has committed the entire control and management of his business to another, reserving no discretion or control to himself, the person to

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whom such power is delegated stands in the place of the master, so that his acts are in law the acts of the master. Such authority to an agent would certainly constitute him the *alter ego* of the principal, but it is not true that, because the master has reserved, either to himself or some superior agent, some control over the inferior agent, the latter cannot stand in the place of the master. Strictly speaking, all servants from the general manager, down through all the grades of the service, to a brakeman, are engaged in the common work of running trains of cars, (and it is only when one of these servants is placed "by the master in his stead to discharge some duty which the master owes to the servant," that he ceases to be the fellow servant of the others,) and becomes the representative of the master. Every spike driven into a cross tie is driven with reference to the running of trains over the road, and the man who wields the sledge to drive it, is, in some sense, a fellow servant of every one employed by the company whose services are necessary to the running of trains. Says Mr. Wood: "The instances are rare in which the master, either by himself, or some superior servant, does not reserve some supervision over every department of his business, or, at least, reserve such a right to himself." Sec. 438.

Buck, the general superintendent of car repairs, was not a fellow servant of plaintiff, and could not have been so regarded if he, instead of Kestler, had been present and given the order, and made the alleged promise to protect plaintiff in obeying that order. And if, by authority of the company, Kestler was placed there to do what fell in the line of Buck's duty, did he not, in respect to that matter, stand in the same relation to the company as Buck himself? And if Buck had personally done what it is alleged Kestler did, could the company have successfully defended the action on the ground that Buck and plaintiff were fellow servants? We recognize the principle that one may act in the dual character of a

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representative of the master, and as a fellow servant. If it had been the duty of the foreman, in this case, to assist, when necessary, in the manual work of repairing the car, in addition to the other duties of superintending, controlling, and directing such work, and he had gone under the car with plaintiff to assist in repairing it, and by some negligent or unskilful act, while so engaged, injured the plaintiff, the latter could not have recovered without proof of facts which entitle one to recover when injured in consequence of the negligence or unskilfulness of a fellow servant. Under the circumstances proved in this case, we think that plaintiff and Kestler were not fellow servants.

The defendant's refused instructions asserted the following general propositions, viz. That although plaintiff and Kestler were not fellow servants, Kestler was not authorized by the company to make the promise alleged to protect plaintiff while under the car, and that notwithstanding such a promise, yet plaintiff could not recover if he failed to set out the red flag, as required by the rule, or to set some one to watch for the approach of engines and trains. It being conceded, as it must be, that the company owed a duty to the men under the car to provide for their safety, can it be that the foreman had no authority in an emergency to use any other means than those adopted by the company? That the red flags, and nothing but the red flags, was the means he was to employ? If for any reason that would clearly, in a given case, have been insufficient as a warning, can it be possible that the foreman would be restricted to the use of the red flags? Or, if, in such case, he had had the red flag set up, and one of the men was injured in consequence of its insufficiency to give the warning, that the company would not be liable to the injured party? Has it discharged its duty by simply adopting a means of protection ordinarily sufficient, when the person in charge of the work knows that in the particular case it is not a sufficient

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warning? If the foreman has authority in such an emergency, that authority results from his general authority to perform the duty of the company, in protecting the employes under his control, in the performance of a dangerous work for the company, and he was authorized to make the promise to the plaintiff for the company, and undertook to set out the red flags in his possession, or to adopt any other means necessary to secure the safety of the men, thereby absolving them from the duty of setting out the flag, or setting the watch. As to the latter, there was no proof of a rule requiring one man to watch while the others worked; and it was in proof that while the work in question could possibly have been done by one man, it could not be conveniently or promptly done by less than two.

It being the duty of the company to provide for the safety of men while engaged in its dangerous service, if it delegates such authority as to the employment of men, and their control and management to an agent, will the law, in the absence of an express stipulation to that effect, declare that such agent is under no obligation, and has no power, as the representative of the company, to provide means for the safety of servants whom he sends into a place of danger to work. If so, the duty of the company to provide such security may be easily evaded by having no one on hand to perform it. And by simply adopting reasonable rules, the observance of which will ordinarily afford protection, although in a given instance the observance of such regulations would afford no protection whatever, and the person representing the company in the direction of the work and the control of the hands, knew the fact. Such abdication of duty can certainly find no support, either in reason or authority. The judgment is affirmed. All concur.

Neilon v. The K. C., St. J. & C. B. Ry. Co.

NEILON V. THE KANSAS CITY, ST. JOSEPH & COUNCIL
BLUFFS RAILWAY COMPANY, *Appellant*.

1. **Negligence : SERVANT, INCOMPETENCY OF.** Where a railroad has knowledge of the unfitness and incompetency of a conductor in charge of its train, and another servant, while engaged in the proper discharge of his duties as brakeman, is precipitated between two cars of the train and injured, by reason of such incompetency of the conductor and his carelessness in having drawn the pin coupling between said cars without notifying the brakeman, the company is liable for such injury.
2. **Practice in Supreme Court : ASSIGNMENT OF JUDGMENT : SUBSTITUTION.** Where one in his lifetime assigns a judgment in his favor and dies pending an appeal to the Supreme Court, the assignee will be substituted as a party in his stead in the latter court. R. S., sec. 3671.

Appeal from Buchanan Circuit Court.—HON. JOS. P.
GRUBB, Judge.

AFFIRMED.

The instructions given for plaintiff were as follows:

"1. It was the duty of defendant to employ careful, reliable, and competent servants to conduct and manage its trains and cars, and if the jury believe from the evidence that the defendant failed to exercise reasonable care in the employment of such servant, or if defendant failed to discharge any servant or employe that it had good reason to believe was careless, unreliable and incompetent, and injury resulted therefrom to plaintiff, without a fault on his part, and while engaged in the discharge of his duties as employe of defendant, then defendant is liable for such injury."

"2. If the jury believe from the evidence that Alfred La Brunerie was not a fit person to act as conductor of defendant's trains, and that after defendant

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had notice of such unfitness it continued him in its employ as such conductor, and the plaintiff, while engaged in his duties as a brakeman on defendant's train, and while exercising reasonable care, was precipitated between two of the cars of said train by reason of the carelessness and unfitness of said La Brunerie, as conductor of said train in having drawn the pin coupling said cars without notifying plaintiff thereof, whereby plaintiff was injured, then the jury will find for plaintiff and assess his damages at such sum not exceeding twenty thousand dollars, as they believe from the whole evidence will compensate him for such injury."

"3. If the jury find for the plaintiff they should, in estimating his damages, take into consideration the age and situation of the plaintiff, his bodily suffering and mental anguish resulting from the injury received, and the loss sustained by want of the limb injured, and the extent to which he was disabled from making a support for himself by reason of the injury received."

"4. The jury are instructed that notice to the general superintendent of the railroad company is notice to the company."

The following instructions were given at defendant's request:

"3. Unless the jury believe from the evidence that the conductor in proof was habitually negligent in the discharge of his duties, and that defendant was guilty of negligence in employing him as conductor, or that the defendant negligently retained him after such carelessness or unfitness became obvious, then they will find for defendant."

"4. There is no evidence that defendant was guilty of negligence in employing said conductor."

"6. A single act of negligence does not establish incompetency or by itself have any tendency to do so."

"8. Unless the conductor in the discharge of his duties as a servant of defendant, owed as a duty, or was

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required by his duty to defendant, to inform the plaintiff that he had cut off the cars, then the jury will find for the defendant."

"11. If the jury believe from the evidence that plaintiff, by his own negligence, directly contributed in any degree to the injury sued for, they will find for defendant."

"12. If the jury believe from the evidence that after the accident in proof at Savannah, the defendant, through its superintendent, investigated said accident and had before him all the persons connected with the train, and the result of said investigation was such that a man of ordinary prudence would not have discharged said conductor, then there is no negligence in defendant retaining said conductor in its employment after said accident."

"13. The court instructs the jury that there is no evidence in this case that the witness La Brunerie, when he was employed by the defendant as conductor, was not a skilful, careful, competent man, and it devolves upon the plaintiff to affirmatively show to the satisfaction of the jury the fact that he subsequently became habitually negligent, and that defendant was informed thereof, and unless he has done so, they will find for defendant."

Strong & Mosman for appellant.

(1) The appellant relies on the following points for a reversal of this cause. That plaintiff and La Brunerie were fellow servants will, we think, be conceded. Upon any other theory some of the allegations of the petition would be superfluous. Upon the facts stated the law would hold them fellow servants. *McGowan v. Ry. Co.*, 61 Mo. 528; *Price v. H. & St. Jo. Ry. Co.*, 77 Mo. 508. (2) The petition stated facts which affirmatively showed that the plaintiff had no cause of action in that it averred that the injury was occasioned by an act which did not

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pertain to the duties of La Brunerie. *Osborne v. Ry.*, 68 Me. 49; *Cousin v. Ry. Co.*, 66 Mo. 572; *Sherman v. Ry. Co.*, 72 Mo. 62; *Flower v. Ry. Co.*, 69 Pa. St. 210; *Oxford v. Peler*, 28 Ill. 434; *Eaton v. D., L. & W. Ry. Co.*, 13 Am. Law Reg. 665; *Snyder v. Ry. Co.*, 60 Mo. 413; *Harper v. Ry. Co.*, 44 Mo. 488. (3) It failed to state facts sufficient to constitute an action based on the failure of La Brunerie to notify plaintiff that he had pulled the pin. *Hayden v. Smithfield Co.*, 29 Conn. 548; *Buffalo v. Holloway*, 7 N. Y. 498; *Field v. Ry. Co.*, 76 Mo. 614. (4) There is a total failure of proof. (a) There is no evidence from which the jury could rationally find that La Brunerie was guilty of any negligence on the occasion of the injury. *Brown v. Congress, etc., Ry. Co.*, 8 Am. & Eng. Ry. Cases, 383; *Wyatt Case*, 55 Mo. 488; *Brown v. H. & St. Jo. Ry. Co.*, 50 Mo. 467; *Railroad Co. v. Jones*, 95 U. S. 439; *Smith v. H. & St. Jo. Ry. Co.*, 37 Mo. 292; *Mo. Pac. Ry. Co. v. Haley*, 25 Kas. 35. (b) The evidence showed that the alleged negligence causing the injury was of such a character that neither plaintiff nor defendant could by any possibility have any notice or knowledge thereof; one as to which defendant could not be charged with negligence. Both being alike ignorant, there could be no recovery. *Hasken v. N. Y. Central Ry. Co.*, 65 Barb. 129. (c) It was shown to be a danger which a master could not be said to have subjected his servant to; a danger the master could not foresee, or by any possibility guard his servant against, and which it was only possible to the servant alone to protect himself from. The master not being in fault, the servant could not recover. *Gibson Case*, 46 Mo. 169; *Mo. Pacific Ry. Co. v. Haley's Adm'r*, 25 Kas. 57; *Davis v. Ry. Co.*, 20 Mich. 105; *Ind., etc., v. Love*, 10 Ind. 556; *Pittsburg Co. v. Sentmeyer*, 92 Pa. St. 276; *Harper v. Ry. Co.*, 47 Mo. 577; *Elliott v. Ry. Co.*, 67 Mo. 272; *Matthew v. Elevator Co.*, 59 Mo. 474; *Wright v. Centr. Co.*, 25 N.

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Y. 571-2. (5) There was a total failure of evidence that La Brunerie was careless, unreliable, and incompetent to discharge the duties of a conductor. *Baulec v. N. Y. & Harlem Ry. Co.*, 5 Lansing 436; *C., C. & I. C. Ry. Co. v. Troesch*, 57 Ill. 155; *Baulec Case*, 59 N. Y. 363; *Lee v. Detroit Co.*, 62 Mo. 568. (6) There was no proof, whatever, that the defendant had any notice or knowledge that La Brunerie was careless, unreliable, or incompetent. *Baulec Case*, 5 Lansing 440; *Warner v. Erie Ry. Co.*, 39 N. Y. 468; *C., C. & I. C. v. Troesch*, 57 Ill. 155; *Baulec v. N. Y. & Harlem Co.*, 59 N. Y. (356) 363-4; *Davis v. Mich. Ry. Co.*, 20 Mich. 105. (7) Conceding that La Brunerie was guilty at Savannah of the acts of negligence charged by Thomas Kane, it affirmatively appears that negligence of the character thus charged and shown had no relation to or connection with the act causing the injury here. *Powell v. Mo. Pac. Ry. Co.*, 76 Mo. 80; *Harlan v. Ry. Co.*, 65 Mo. 22; *C., C. & I. C. Ry. Co. v. Troesch*, 57 Ill. 155; *Wright v. Central Ry. Co.*, 25 N. Y. 571-2. (8) The court erred in giving and refusing instructions. *Yarnall v. Ry. Co.*, 75 Mo. 575; *Goodwin v. Ry. Co.*, 75 Mo. 73; *Bell v. Han. & St. Jo. Ry. Co.*, 72 Mo. 50.

Woodson & Crosby and B. R. Vineyard for respondent.

(1) "If the defendant was negligent or unmindful of its duty in employing competent and skilful servants in the execution of its business and injury resulted therefrom, it must be held responsible. And of the sufficiency of the proof to sustain this fact, the jury were the proper judges." *Harper v. Railroad*, 47 Mo. 579; *Harper v. Railroad*, 44 Mo. 490. (2) This suit, a judgment having been rendered in the lifetime of the plaintiff, does not abate by reason of his death. *Lewis v. Railroad*, 59 Mo. 503. And those to whom the judgment

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was assigned by the original plaintiff, in his lifetime, are the proper ones to be substituted as parties plaintiff in the Supreme Court. R. S., sec. 3671. (3) The defendant is liable in this case for the reason that the conductor was not only shown to have been negligent and unfit for the place he held, but the defendant was shown to have been guilty of negligence in placing him in charge of the train when, from an investigation had a short time before, he was found, by the defendant itself, to be unfit for the position of conductor, and was suspended for two weeks on account of such unfitness. The railroad company may be held responsible for the negligence of an unfit servant, whenever that unfitness is shown to exist for such time and under such circumstances that the managing officers of the company ought to have known of it, or where a specific act has shown such unfitness, and knowledge of that act has been brought to such officers. *Ill. Cent. Railroad v. Jewell*, 46 Ill. 101; *The Tex. Mex. Ry. Co. v. Whitmore*, 11 Am. & Eng. Railroad Cases, 195, September, 1883, number; *Ry. Co. v. Doyle*, 18 Kas. 65-66; *The P. & Ft. W. & C. Ry. Co. v. Ruby*, 38 Ind. 318; *Wabash Ry. Co. v. McDaniels* (U. S. Sup. Ct.) 11 Am. & Eng. Ry. Cases, 158, September, 1883, number; Wharton on Negligence, sec. 238.

RAY, J.—This action was begun, and trial had, in the circuit court of Buchanan county, Missouri. The plaintiff, Michael Neilon, was a brakeman employed by the defendant, and at the time of receiving the injuries sued for, was acting as head brakeman on one of defendant's freight trains, which was then in charge of a conductor named La Brunerie. Neilon had been acting as such brakeman on La Brunerie's train for two weeks, during which time he had made four round trips between Hopkins and St. Joseph. Before, or about the time of the arrival of the train in question, at Amazonia, said conductor notified plaintiff that two cars were to be set

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out of the train at said station, and told plaintiff to pull the pin and cut off the cars. It seems that the train pulled off a branch line at said station, and was backing up on the main line to set out the cars, when the accident occurred. The manner in which it happened, and the grounds of liability therefor, are set out in the petition substantially as follows :

“That while said train was backing to detach and leave part of its cars, one Alfred La Brunerie, who was conductor of said train, and had charge and control thereof and of defendant's employes at work thereon, carelessly, and without notifying plaintiff, pulled the pin from the coupling between the rest of the train and the cars to be detached, although it was no part of his duty to pull said pin, and the plaintiff, while walking along the top of said train, in the discharge of his duties as brakeman thereof, and about stepping across the coupling from which said pin had been removed without his knowledge, at the slowing of the engine was, by reason of said removal of said pin, and the consequent (but unexpected, to him) parting of said train, precipitated upon the track, run over, and injured as aforesaid ; that said La Brunerie was careless, unreliable, and incompetent to discharge the duties of conductor, as defendant well knew before, and at the time of placing him in charge of said train, and that defendant, well knowing him to be thus careless, unreliable and incompetent, had wilfully and negligently retained and continued him in its employ, and placed him in charge of said train as aforesaid.”

Defendant's answer was a general denial, except as to its incorporation and plaintiff's employment and service as its brakeman, and set up further contributory negligence on part of plaintiff, which was denied generally in the reply of plaintiff. Under our view and disposition of the case, it is not necessary, we think, to set out the evidence in the cause. It will be noticed, and

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some portions thereof quoted, in the progress of the opinion. Under the evidence and the instructions, which will also be considered hereafter, plaintiff obtained a verdict and had judgment thereon, from which defendant has taken this appeal to this court.

An objection is made, in the first instance, to the sufficiency of the petition. It contained an allegation to the effect, it will be observed, "that it was no part of the conductor's duty to pull the pin," and it is contended for appellant that under said allegation, as said act did not pertain to the duties of his employment as conductor, no cause of action was stated against the defendant. For the respondent, it is contended that when considered in connection with the other allegations in the petition, as well as with the balance of the allegation of which it forms a parenthetical clause, or subordinate part, it does not charge that it was no part of his duty as conductor to pull a pin under proper circumstances, but that it simply avers that it was no part of his duty at that time and under those circumstances to pull the pin without notifying the plaintiff. We do not think it very important or material which, if either, of these views may be correct. It was not the act of pulling the pin that caused the plaintiff's injury. This is conceded. It was the failure to notify plaintiff of said act that was the procuring cause of the injury, and it is not admitted or averred in the petition that this was no part of the conductor's duty nor within the scope of his employment. On the other hand, the petition further alleged that said conductor carelessly and without notifying plaintiff, pulled the pin, whereby the train unexpectedly parted, and thereby he was precipitated upon the track, run over and injured. It charges, also, as we have seen, that said conductor was incompetent and unreliable, and that defendant employed and wilfully and negligently retained him in its employ as conductor, well knowing that he was careless, unreliable, and incompetent. These

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allegations state a cause of action and the petition is, we think, sufficient. *The P., Ft. W. & C. Ry. Co. v. Ruby*, 38 Ind. 311; *Ill. Cent. Ry. Co. v. Jewell*, 46 Ill. 101; *Harper v. I. & St. L. Ry. Co.*, 47 Mo. 579; *Harper v. Ind. & St. L. Ry. Co.*, 44 Mo. 490-91.

It is charged in the petition that defendant well knew before and at the time of placing La Brunerie in charge of the train that he was incompetent, but there was no evidence to sustain said averment and that question was taken from the jury by appropriate instructions. The substantial controversy in the case is as to the character of La Brunerie's act, whether he was negligent or otherwise in pulling the pin and failing to notify plaintiff, and as to the incompetency of said conductor and his retention by the defendant, with notice and knowledge thereof. As to the misconduct of La Brunerie upon this occasion we think little need be said. He was the officer and servant in entire control of the train, and men employed thereon. His act was not that of a volunteer. While it was not his duty, usually, to uncouple the cars, he might rightfully and lawfully do so. Mr. Barnard, in his testimony, says: "Ordinarily, brakemen ought to couple and uncouple cars; when order is given to head brakeman it is his duty to uncouple cars; don't think conductors ever uncouple cars after ordering brakemen to do so." In this instance, however, La Brunerie gave Neilon, who was the head brakeman, the order to uncouple and set out the cars, and proceeded, almost immediately and directly, to pull the pin, and then failed to notify plaintiff. This was negligence and carelessness, to say the least, and on this occasion, as upon another to which we shall refer again, directly, "he did not seem to have (as the superintendent then said), a clear understanding of his duties in giving his orders to his men." It is plain, we think, that there was evidence in the case sufficient to authorize and require the trial court to submit to the jury the issue whether

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said conductor was incompetent, and whether defendant had retained him as such, with notice and knowledge thereof.

A brief statement of portions of the evidence material and pertinent to this part of the inquiry will be sufficient. La Brunerie's experience as a freight train conductor consisted of his service as such for the six weeks next preceding the accident, during two of which, as we shall shortly see, he was suspended. The plaintiff, it will be remembered, was injured October 8, 1877. Prior thereto and to plaintiff's service with him, and about the last of August or first of September, another accident had happened to La Brunerie's train at Savannah, whereby the defendant's property, engine and cars had been injured. Within a day or two thereafter, General Superintendent Barnard instituted and conducted an examination into the causes of said accident, having La Brunerie and others to appear personally before him. The witness Kane, who was then a brakeman on La Brunerie's train, testifies that he then "told Mr. Barnard that La Brunerie was not capable of running a train; that he was in the habit of drinking and sleeping on duty." It is proper to say that Mr. Barnard had no recollection of such statement being made to him. La Brunerie, in his account of said accident, at that time sought, it seems, to cast the blame therefor on the brakeman, Kane, but when called as a witness, and put under oath, he stated upon this trial that he was to blame for the accident at Savannah, and that he was drunk and asleep. As a result of said investigation by the superintendent, Kane was discharged and La Brunerie suspended, or "laid off," for two weeks. Mr. Barnard testified that he suspended La Brunerie because he thought La Brunerie should have known what his brakemen were doing, and should have been on the front end of his train, and "because he did not seem to have a

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clear understanding of his duty in giving orders to his men." Mr. Barnard further testified that he finally discharged LaBrunerie for being asleep on duty, some time afterward. D. H. Winston, assistant superintendent of defendant, testified, among other things, that during this suspension La Brunerie applied to him for a letter of recommendation, so that he could get work elsewhere, and that he refused to give the letter because of the suspension.

Competent men, it is true, may be, and are sometimes, forgetful or negligent, and, it may be conceded, as claimed by appellant, that a single act of negligence does not prove, or, by itself, even tend to prove incapacity; yet, under the evidence, this hardly meets the requirements of the present case. The conclusion arrived at by Barnard, the superintendent, after investigating the cause of said former accident, and after a personal examination of La Brunerie himself, as to his conduct at that time, involves, we think, something more than a mere omission on his part on that occasion. If, as stated by Barnard, La Brunerie "did not seem to have a clear understanding of his duty in giving orders to his men," it would seem to imply such want of capacity and intelligence as to disqualify him for the safe discharge of the important and hazardous duties of his position as conductor. There was, however, opposing evidence in other statements of said witnesses and from other witnesses, on behalf of defendant, making such a conflict of testimony as justified the submission of the same to the jury for their determination, as before stated.

Instructions, four in number, were given for plaintiff, and seven for the defendant, presenting the issues, we think, with unusual clearness and precision, and fairly, and, perhaps, even favorably, to the defendant. A num-

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ber were refused for the defendant, but the whole case was covered by those given, and we perceive no error in the court's action thereon and no prejudice to the defendant in this behalf. Other questions are suggested in the briefs of counsel, and numerous authorities cited, but from the view we have taken of the case we deem them not material to the proper disposition of the case, and no further notice need be taken of them.

Michael Neilon, the original plaintiff in this cause, having died after the cause was appealed to this court, and the case having been duly revived in the name of — Smith, as the legal representative or administrator of said deceased, and it appearing to the court by stipulation of parties, on file in this court, among other things, that said Michael Neilon, in his lifetime, on the record, when the judgment in this cause was entered, assigned said judgment to Silas Woodson and Benjamin R. Vineyard, they, the said Woodson and Vineyard, on their motion, are, by the order of this court, hereby substituted as such assignees as parties plaintiffs in this action, under and by virtue of section 3671 of the Revised Statutes of 1879.

For the reasons hereinbefore stated, the judgment of the circuit court is affirmed. All the judges concur.

Kimes v. The St. L., I. M. & S. Ry. Co.

**KIMES V. THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN
RAILWAY COMPANY, Appellant.**

1. **Negligence : RAILROAD CROSSING : FAILURE TO KEEP IN REPAIR.** Where a railroad fails to keep its crossing over a public road in repair, and in consequence thereof, a team is stalled and struck by a passing train, it is liable for the injury.
2. — : **CONTRIBUTORY NEGLIGENCE.** If the owner of the team negligently went upon the crossing, without looking or listening for the approach of trains, and might, by ordinary care, have seen or heard the train in time to have avoided the accident, the company would not be liable.
3. **Interest : REMITTITUR : PRACTICE IN SUPREME COURT.** Interest is not recoverable in an action for negligent injury to property. The error of the lower court, however, in authorizing the recovery of interest, may be cured by a *remittitur* in the Supreme Court.

Appeal from Wayne Circuit Court.—HON. R. P. OWEN, Judge.

AFFIRMED.

Geo. H. Benton for appellant.

(1) The complaint fails to state a cause of action, and defendant's objection to the introduction of any evidence under same should have been sustained. (2) Defendant's demurrer to the evidence at the close of plaintiff's evidence, and also at the close of the whole case, ought to have been sustained. *Powell v. M. P. Ry.*, 76 Mo. 80; *Lenex v. M. P. Ry.*, 76 Mo. 86; *Moody, P. Ry. Co.*, 68 Mo. 472; *Kelly v. H. & St. J. Ry. Co.*, 75 Mo. 140; *Purl v. A. & P. Ry. Co.*, 72 Mo. 168; *Johnson v. C., R. I. & P. Ry.*, 77 Mo. 546; *Harlan v. Ry. Co.*, 65 Mo. 22; *Henze v. St. L., K. C. & N. Ry.*, 71 Mo. 636;

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Fletcher v. A. & P. Ry., 64 Mo. 484; *Turner v. H. & St. J. Ry.*, 74 Mo. 604. (3) The instruction given by the court at plaintiff's request, is improper, illegal, indefinite and misleading. *Clardy v. Ry.*, 73 Mo. 576; *Lincoln v. Ry.*, 75 Mo. 27; *Wade v. M. P. Ry.*, 78 Mo. 366; *Meyer v. Ry.*, 64 Mo. 543; *DeSteiger v. Ry.*, 73 Mo. 33; *Kenny v. H. & St. J. Ry.*, 63 Mo. 99; *Marshall v. Shricker*, 63 Mo. 309. (4) Instructions two, four and five, asked by defendant, should have been given by the court. (5) The court erred in the instruction it gave of its own motion. *Henry v. Ry.*, 76 Mo. 293.

C. D. Yancey for respondent.

(1) The error as to the interest is cured by the *re-mittitur*. *Hahns v. Sweazea*, 29 Mo. 199; *Western, etc., v. Kribben*, 48 Mo. 37; *Wade v. Ry.*, 78 Mo. 362. (2) It was the duty of defendant not only to construct, but to maintain a good and sufficient crossing at the point where its railway crossed the public road. R. S., sec. 807; *Lincoln v. Ry.*, 75 Mo. 27. (3) The plaintiff exercised due care before attempting to cross.

NORTON, J.—This suit was brought to recover damages for killing a horse and breaking a wagon, by a train of defendant's cars on a public road crossing, alleged to have been occasioned by the failure of defendant to construct and maintain a good and sufficient crossing over its road. Plaintiff obtained judgment for \$129.60, from which the defendant has appealed.

The evidence on the trial tended to show that the crossing in question was, at the time of the accident, and for some time previous had been out of repair, and in bad condition, and that in consequence thereof, plaintiff's horses, hitched to a loaded wagon, which plaintiff was driving over the crossing, stalled with the wagon on

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the track, and one of defendant's passing trains struck the wagon, damaging it and killing one of the horses. Plaintiff testified that before he drove on the track, or crossing, he looked up and down the railroad track, but saw no train; that he could see up the track half a mile, and down the track one-sixth of a mile; that he saw it coming when it was a quarter of a mile off. The evidence of the engineer was to the effect that he first saw plaintiff the distance of four telegraph poles from the crossing, there being twenty-eight poles to the mile; that, when he drove on the track there were two telegraph poles between the engine and the wagon on the crossing; that his train was running seventeen miles per hour, and that it was impossible to check the train in time to avoid the collision, although he did all in his power to do so.

The court, we think, under the evidence, was justified in submitting the case to the jury. The court gave two instructions, one to the effect that if the accident was occasioned by the failure of defendant to keep the crossing in repair, they would find for plaintiff the amount of damage sustained, with six per cent. interest; the other to the effect that if plaintiff negligently went upon the crossing without looking or listening for the approach of the cars, and might, by ordinary care, have seen or heard the train in time to have avoided the accident, the jury would find for defendant.

There was no error in refusing the instructions asked by defendant, inasmuch as those given fairly submitted the issue, except in the particular hereinafter noted, to the jury. It is insisted that error was committed in refusing an instruction of defendant's to the effect, that they could not find for defendant on the grounds of failure to ring the bell, or sound the whistle, or for the negligent management of the train. While there was no evidence that defendant omitted, or failed to ring the bell, or

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sound the whistle, as required, in approaching the crossing, nor any evidence that the train was negligently run or managed, the performance of its duty, in these respects, did not excuse the defendant from its liability for not keeping the crossing in repair, provided such omission caused the injury, and as to whether it did or not, was the only issue with which the jury had to deal, under the instructions which the court gave.

The first instruction given by the court is erroneous in this, that it authorized the jury to allow six per cent. interest on the damages, and but for the *remittitur* of \$9.60 which plaintiff has entered in this court, the judgment would be reversed. *DeSteiger v. H. & St. J. Ry. Co.*, 73 Mo. 33, and cases there cited. The lowest estimate placed by the evidence on the value of the horse killed, was one hundred dollars, and the lowest estimate for damage to the wagon was twenty dollars, and as the *remittitur* of the above sum cures the error in the instruction, the judgment will be affirmed in all respects, except as to the sum of \$9.60 remitted, and plaintiff and appellee will be adjudged to pay the costs of this appeal which are hereby adjudged against him. *Miller v. Hardin*, 64 Mo. 545; *Wade v. Mo. Pac. Ry. Co.*, 78 Mo. 362. All concur.

In the Matter of Marquis.

IN THE MATTER OF MARQUIS; SNYDER, *Guardian*,
Appellant.

1. Probate Court: INSANE PERSON: SETTING ASIDE JUDGMENT. A probate court can, at a subsequent term, set aside its judgment adjudging a person insane and appointing a guardian for him.
2. ———: ———: ———. It is sufficient ground for setting aside such judgment that it does not appear from the record that the alleged insane person was notified of the proceeding against him, and if not notified, the reason therefor.

Appeal from Howard Circuit Court.—HON. G. H.
BURCKHARTT, Judge.

AFFIRMED.

S. C. Major and J. W. Bagby for appellant.

(1) The only jurisdiction the probate court had in this matter being conferred by statute, its powers are limited within the confines of the statute which gave it jurisdiction. R. S., sec. 1187; *Schell v. Leland*, 45 Mo. 289. (2) The probate court, under the statute, could set aside an inquisition only during the term in which it was had, and when so set aside it is the duty of the court to impanel a new jury to inquire into the facts. R. S., sec. 5794. (3) The adjourned September term of the August term of the Howard probate court having finally adjourned, the regular August term was at an end; and the only jurisdiction of the probate court, being of statutory origin, its powers with reference to the finding of the jury and the order and final judgment of the court thereon was at an end. The transcript itself showing that there was no irregularity in the proceedings, or de-

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fect of the record, at the August adjourned term when the inquisition was had, the subsequent order and judgment of the probate court made at its regular November term with reference thereto was a nullity. *Ashby v. Glasgow*, 7 Mo. 320; *Peake v. Reed*, 14 Mo. 79; *State ex rel., etc., v. County Court of Sullivan Co.*, 57 Mo. 522; *Phillips v. Evans*, 64 Mo. 17; *Bartling v. Jamison*, 44 Mo. 141; *Danforth v. Lowe*, 53 Mo. 217; *Jefferson County v. Cowan*, 54 Mo. 235; *State ex rel. Gordon v. Hopkins* Octobbr Term 1883.

A. J. Herndon, Thos. Shackelford, and Draffen & Williams for respondent.

(1) The probate court properly set aside the proceedings had September 10, 1883, declaring respondent insane, although the motion asking this to be done was not filed till a subsequent term. *Dutcher v. Hill*, 29 Mo. 271. (2) The record shows no reason why notice was not given to respondent of the proceeding against him. The proceedings were properly set aside for such irregularity. *Harbor v. Ry.*, 32. Mo. 423; *Stucker v. Cooper Circuit Court*, 25 Mo. 401; Freeman on Judgments (3 Ed.) secs. 97 and 98.

NORTON, J.—On the tenth day of September, 1883, Lafayette Marquis filed in the probate court of Howard county an information that his father, Washington Marquis, was a person of unsound mind and praying that an inquiry of the matter be had. The court made the following order: "Now, at this day, comes Lafayette Marquis and files information that Washington Marquis is a person of unsound mind, and upon proof that he is not in condition of mind and body to be brought into court, it is ordered that he be not brought into court." The

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facts were inquired into by a jury, which returned a verdict that said Marquis was a person of unsound mind and incapable of attending to his business, whereupon the court rendered judgment according to the verdict, and appointed B. F. Snyder as guardian of the person and estate of said Marquis, who qualified by giving bond as the order of the court and statute required. At the next regular term of said court, viz. : on the fourteenth of November, 1883, the said Marquis, who had been adjudged insane at the August term, appeared and moved the court to set aside the judgment and the order appointing said Snyder guardian, alleging as ground therefor that notice had not been given him of said proceedings; that he was not of unsound mind, and the fact that such proceedings had been instituted against him was concealed from him, and that he was in proper condition to be notified and brought into court. This motion was sustained, whereupon said Snyder appealed to the circuit court, where the judgment of the probate court was affirmed, from which said Snyder has appealed to this court.

The principal ground relied upon to sustain the appeal is that the probate court had no power at its November term to vacate or set aside the order made at its preceding August term. The correctness of the principle above stated may be conceded, but we think the application of it in the case of *Dutcher v. Hill*, 29 Mo. 271, is denied to cases of inquest of lunacy where irregularities appear upon the face of the proceedings. It was ruled in that case that: "The proceedings under the law concerning insane persons are not like a final judgment, which is unalterable after the end of the term at which it was rendered. They are *in fieri*, like a cause pending, and irregularities in them or defects of the record may be obviated at any time so long as the lunatic

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is under the control of the guardian appointed for him. It was competent for the court to discharge the lunatic at any time from the care and custody of the guardian so soon as it was informed of the irregularity of the proceeding."

Under the ruling in the above case, the only remaining question is, whether or not irregularities appear in the proceedings of this case. It is provided by section 5789, Revised Statutes, as follows: "In proceedings under this chapter, the alleged insane person must be notified of the proceeding; unless the probate court order such person to be brought before the court, or spread upon its record the reason why such notice or attendance was not required." By reference to the order hereinbefore recited, it will be seen that it fails to comply with the requirement of the statute in this, that it neither states that notice was given Marquis, nor does it state, if notice was not given, the reason why it was not given. The statement is made in the order that he was not in condition of body and mind to be brought into court. While this may be a sufficient statement of the reason why Marquis' attendance was not required, it does not show any reason why notice was not given him.

Judgment affirmed. All concur.

Harkless v. Barton County.

HARKLESS, Plaintiff in Error, v. BARTON COUNTY.

Quit-claim Deed: SUIT FOR PURCHASE PRICE OF LAND. Plaintiff bought land of the defendant Barton county, receiving a quit-claim deed therefor, which land defendant had previously sold to another. Plaintiff sold the land and it does not appear that his grantee was ever disturbed in his possession. *Held*, that plaintiff received what he bargained for, and cannot recover in a suit against the county for the purchase price.

Error to Barton Circuit Court.—HON. J. D. PARKINSON,
Judge.

AFFIRMED.

Robinson, Harkless & Bennett for plaintiff in error.

H. C. Timmonds for defendant in error.

HENRY, C. J.—In 1866, Harkless purchased of Barton county a tract of land in said county, and received a quit-claim deed from the county therefor. In 1861, the county sold and conveyed the same land to one Herndon, whose deed was of record when plaintiff took his quit-claim deed. In this suit plaintiff seeks to recover from Barton county two hundred dollars, the price he paid for the land. After he purchased, plaintiff sold the land to one Walser, who sold to Addison, who also had a deed for the land from Herndon, and was in possession when this suit was brought. The deed from the county to plaintiff conveyed only the interest of the county in the land. He received just what he bargained for, and subsequently sold the land to Addison; what he received for the land does not appear, nor does it appear that his grantee was ever disturbed in his possession, or threatened by Herndon, to whom the county had previously conveyed the land.

The judgment was for defendant and is affirmed.
All concur.

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THE STATE *ex rel.* THOMAS V. HOBLITZELLE, *Recorder of Voters of St. Louis, Appellant.*

1. **Poll Books, etc., Inspection of:** CITY OF ST. LOUIS. One whose object is to vindicate some public or private right is entitled to inspect the registration lists, poll books, and lists in the custody of the recorder of voters of the city of St. Louis and used at an election in said city.
2. **Mandamus.** Mandamus will lie to compel the recorder of voters to grant such inspection.

Appeal from the Circuit Court of St. Louis City.—HON. A. M. THAYER, Judge.

AFFIRMED.

Leverett Bell for appellant.

(1) The jurisdiction of the courts to control by mandamus the action of a public officer is limited to cases where the officer refuses to perform a specific act, the performance of which is enjoined on him by the law governing his office. If the matter is one resting in the discretion of the officer, or if there is no provision of law directing the execution of the particular act, the writ must be refused. *State, etc., v. County Court*, 41 Mo. 221; *State, etc., v. Garesche*, 65 Mo. 480. (2) Under the terms of the act of March 31, 1883, the poll books and registration lists specified in the alternative writ are not public records and are not open to inspection, except at the official canvass following the election, or as evidence in a case of contested election. (3) The present proceeding is based on the statement that the relator intends to contest under the statute the election held in the city of St. Louis on April 7, 1885, of Martin Neiser to the office of city marshal of the city of St. Louis. The statute law

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of this state contains no provision vesting jurisdiction in any court in Missouri to hear and determine the case referred to, and the relator is, therefore, on his own theory, not entitled to an inspection of the poll books and registration lists containing the returns of said election.

A. R. Taylor, Dyer, Lee & Ellis, and G. D. Reynolds for respondent.

NORTON, J.—This case is before us on the appeal of defendant from the judgment of the circuit court of the city of St. Louis, awarding a peremptory writ of mandamus directing defendant to allow relator to inspect the registration lists, poll books, and lists used at an election held in said city on the seventh day of April, 1885, and on file in the office of the defendant as recorder of voters. At said election, relator was a candidate for the office of city marshal, and one Martin Neiser was also a candidate for the same office and received a certificate of election.

Relator in substance avers that he received a majority of the votes cast at said election, and was in fact duly elected, and intends to contest the election with a view to establish his right to the said office, and that for the purpose of enabling him to prepare his notice of contest, and state the grounds upon which it is based, he demanded of defendant that he and his attorneys be permitted to inspect the registration list and poll books used at said election, which defendant refused. Upon such refusal this proceeding by mandamus to compel defendant to allow such inspection was instituted, awarding a peremptory writ. While it was conceded by counsel in the argument before the court, that as a rule records required to be kept in the office of a public officer are public records and open to inspection under the supervision of the officer; and while it was admitted

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that the recorder of voters in the city of St. Louis was a public officer, and the registration lists and poll books, when filed in his office to be "securely kept" by him, were not private, but public records, it was insisted by counsel in an elaborate argument that the law of 1883 discloses a legislative intent that such registration lists and poll books should not be open to inspection, and that as to them the rule above stated was inoperative for that reason. In support of this position, it is argued that inasmuch as it is provided in said act of 1883 that when a person who had been appointed judge of an election fails or refuses to serve, the voters at the poll may elect one to serve in his place, subscribing "their names in witness of such election to a paper which shall be returned by the judges of the precinct to the recorder of voters, to be filed by him among the papers of his office, and be subject to inspection by any qualified voter;" that it follows under the operation of the rule, *expressio unius, exclusio alterius*, that the legislature intended that the registration lists and poll books should not be subject to inspection. In other words, the argument is, that as the legislature in section eighteen of the statute provided as to that class of papers subscribed by the voters at the poll, who elect a judge to serve in place of one who fails or refuses to serve, that they should be open to inspection, and in the same section as to another class of papers, viz.: registration lists and poll books, only provided that they should be "securely kept" by the recorder, that it, therefore, follows that inspection of the latter class of papers was intended to be denied.

We think the statute is susceptible of a more reasonable solution than the one contended for. It is this; inasmuch as the paper to be signed by the voters at the poll who elect a judge to fill the place of one appointed who fails or refuses to serve, does not emanate from any officer known to the election law, but from

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private persons, and inasmuch as doubts might arise in consequence of this fact as to whether such a paper when returned to the recorder would be such a record as under the general rule would be subjected to inspection, the general assembly, to make that plain, which would otherwise have been involved in doubt, expressly provided that such papers should be open to inspection. Besides this, it is provided by section twenty of said act, that the ballots after being counted shall be placed in the ballot boxes, which are to be sealed and delivered by two judges of each election precinct to the recorder of voters, who is required to keep them safely for twelve months, and not allow the same to be inspected or handled, unless in a case of contested election, or unless the same shall become necessary to be used in evidence, and then only on the order of a proper court. Now here is one class of papers required to be kept safely by the recorder, which it is declared shall not be inspected, except under the circumstances therein mentioned, and it would follow from this, under the rule invoked by counsel, that all other classes of papers in the recorder's office, the inspection of which is not forbidden, would be open to inspection.

By the act of 1883, there is only one thing on which the seal of secrecy is stamped, and that is the ballot cast by the voter, and to this the judges and clerks of the election are forbidden, under penalty, from disclosing how any voter voted, and the ballots when counted are securely sealed in the ballot boxes, returned to the recorder, and are not to be inspected by him or anybody else, until the seal is broken in case of contested election, or when it becomes necessary to use them in evidence, and only then on the order of a proper court. It is also argued that it is against the policy of the law and destructive to the secrecy of the ballot to allow the poll books to be inspected.

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We are unable to see the force of this argument, but, on the contrary, if it be a fact, as it is averred to be by relator, that he was a candidate for the office of city marshal, and received a majority of the legal votes cast at the election, and by fraud or mistake the certificate of election was denied to him and given to another, public policy demands the exposure of the fraud and the rectification of the mistake, and that all proper facilities should be afforded to bring about these results. Nor can we see how an inspection of the poll books tends either to destroy or impair the secrecy of the ballot. While the inspector would learn from it who voted, he could not learn how or for whom the voter voted. While we regard the poll books as belonging to that class of public records, open to inspection when the applicant who desires to inspect them, shows that the purpose of the inspection is to vindicate some public or private right, the courts will by mandamus compel the inspection on condition that the inspection be made "under such reasonable rules and regulations as the court or officer having them in charge may impose." Whether mandamus will or will not lie to compel an inspection of poll books when it is sought simply for the gratification of curiosity without any purpose to vindicate either a private or public right, is not necessary to determine in this proceeding, as it does not present such a case. The relator claims that by reason of his receiving a majority of the votes cast at the election, he acquired a right to the office of city marshal, and desires the inspection asked for as a means of enforcing this right.

It is also contended that the peremptory writ should be refused on the ground that under the constitution and laws of the state, no provision is made for contesting an election of a city officer. This question we will not anticipate, but say of it, as was said by Judge Thayer in a clear and conclusive opinion filed by counsel as part of

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their argument, that, "the question is not whether the statutory remedy under section 5528, or any other legal remedy, is in point of fact open to the relator, but whether the application is made in good faith by an interested party, for the establishment of his individual right, and in pursuit of a remedy recognized by law to which relator supposes himself to be entitled." If the application is made in good faith, and there seems to be no good reason to doubt that it is so made, the application should be granted.

Judgment affirmed. All concur. Sherwood, J., expressing himself in a separate opinion.

SHERWOOD, J., CONCURRING.—I have no doubt that the relator is entitled to the relief he seeks, whether as a citizen or whether as a contestant. For the latter purpose he states such facts as entitle him to a standing in court, and to the enforcement of the specific right to which he lays claim. For the former purpose the simple allegation that petitioner is a citizen, without more, is the sesame which unlocks the gate of mandatory authority whenever an officer, whose functions are merely ministerial, refuses to perform his office and thereby causes detriment to the public interest. On this point an accepted authority says: "Where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator at whose instigation the proceedings are instituted, need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen and as such interested in the execution of the laws." And after citing numerous authorities in support of the position, the author adverts to the views to the contrary taken in some of the states, and then observes: "However satisfactory the reasoning of the courts in the states here referred to

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may appear, the undoubted weight of authority supports the doctrine as laid down in the preceding section." High Extra. Leg. Rem. (2 Ed.) secs. 431, 432, and cases cited; *Ib.* sec. 416. And in a subsequent section the learned writer cites instances where a private citizen has been permitted to assume the role of relator in proceedings by mandamus to compel municipal authorities to maintain and keep open a bridge, these being legal duties of the authorities; to compel highway commissioners to comply with their duty in opening a public road; and in other matters of the enforcement of a strictly public right as *ex. gr.*, the canvassing of election returns, a case very closely analogous to the case at bar, any citizen may be relator in madamus proceedings. And in the same section it is observed in immediate connection with these instances: "In all such cases the refusal of the officers to act is no more the concern of one citizen than of another and it is the right, if not the duty, of every citizen to interfere and see that the public grievance is remedied. * * * And the rule, as sometimes stated, that the relator must show an individual right to the thing sought, is to be taken as applicable only to cases where individual interests are affected, and it has no reference to cases where the interest is common to the whole community, or to the public at large." *Ib.* sec. 433, and 9 Cent. L. J. 362.

The cases cited to uphold the doctrine just announced yield it the most abundant support and leave no doubt of the stable basis on which it rests. A recent case, that of *Ferry v. Williams*, 41 N. J. Law, 332, adds to the weight of judicial decision. In that case a citizen of Orange being desirous to know whether the charter provisions of that town had been observed in respect to licensing saloons, requested of the collector an inspection of the letters on which the licenses had been granted. This request being denied by the collector and the common council, on appeal to them, backing him therein, the citizen thereupon applied to the Supreme Court of the

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state for a mandamus to compel the desired inspection ; and although he showed, as remarked by Dixon, J., "no interest to be subserved by an inspection of these letters, except that common interest which every citizen has in the enforcement of the laws and ordinances of the community wherein he dwells," the court awarded a peremptory writ after a full and exhaustive discussion of the authorities and of the principle of law which they assert. In the case just cited, the relator asserted that he had the right of inspecting the letters, and the collector denied this, and this was the point in judgment, and the learned judge, who delivered the opinion of the court, expressly states that whether such a right existed, depended on *general principles*, "since the statutes of the state are silent upon the subject ;" and it was then ruled that the letters were documents of a public nature, which relator, by reason of his common interest in the enforcement of the laws, had the right to inspect.

And the remark of Lord Denman in *Rex v. Justices, etc.*, 6 A. & E. 84, is there approvingly quoted, that : "The court is by no means disposed to narrow its authority to enforce by mandamus the production of every document of a public nature in which any citizen can prove himself to be interested. For such persons, indeed, every officer appointed by law to keep records, ought to deem himself for that purpose a trustee." The case cited from New Jersey is well nigh decisive of the one at bar on both these points: First. The right of citizenship alone conferring the right of relatorship in cases of this sort. Second. That the poll books are public records and open as such to every citizen's inspection. That the first point is settled by the authorities quoted is abundantly clear. This being true, the second, though not expressly ruled, would seem logically to follow ; for surely a poll book or things of that nature ought to occupy fully as high a documentary plane as do letters on which a saloon license is granted. To my mind, however, the

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second point is quite too plain for discussion and needs neither argument nor authority in its support. The records being public ones ; records pertaining to the preservation of the evidence of the exercise of one of the highest and most sacred rights of a freeman ; a right which constitutes the foundation stone of American liberty and national government, it is not too much to say that the right, within all reasonable bounds, of inspecting such records is no less broad than the right of citizenship on which it rests.

And it may be further observed, that though, undoubtedly, a contestant or citizen in the circumstances of this case, might have his action on the bond of an officer who gives bond, or his ordinary action against the recorder of voters, yet this does not by any means supersede or preclude resort to mandamus ; for the reason and the test in such cases is that mandamus is the only remedy which will secure to the party complaining, the specific relief to which, as already announced, he is clearly entitled. High Extr. Leg. Rem., sec. 82, and cases cited. For these reasons the judgment should, in my opinion, be affirmed. I have deemed it best in this separate opinion to place the right of relator to a peremptory writ on the right of citizenship as well as on that of being a contestant ; for if his right to inspection of the poll books, etc., is made to turn *alone* on his claim as a contestant, as I understand the majority opinion to go, and there should be no *form* in which contestant can try his right in that respect, as is expressly alleged in the return, it is quite too obvious for discussion that a peremptory writ would be fruitless, and should, therefore, be denied. Henry, C. J., concurs with me.

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SHEPARD V. THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellant.

1. **Commission to Examine Witnesses:** REVISED STATUTES, SECTION 2144, ET SEQ. The statute (R. S., sec. 2144, *et seq.*) does not specify any state of facts upon which a commission authorized by it to examine witnesses upon interrogatories, shall be granted, and its allowance is a matter largely within the discretion of the trial court or judge.
2. ———: PRACTICE. The adverse party cannot, at the close of the direct interrogatories, cross-examine the witness whose testimony is taken under such commission. He should file cross-interrogatories.
3. **Action for Personal Injuries:** RIGHT TO COMPEL PLAINTIFF TO SUBMIT TO PERSONAL EXAMINATION. The right of the defendant in an action against him for a personal injury, to have the plaintiff's injuries personally examined by physicians, so that the latter may testify as to their character and extent, is not an absolute one. It is a matter as to which the trial court has a discretion, which will not be interfered with, unless manifestly abused.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

H. S. Priest with T. J. Portis for appellant.

(1) The court erred in granting the order to examine Dr. Staples on interrogatories. (2) The court erred in refusing to order the plaintiff, under the peculiar circumstances of this case, to submit herself to an examination by competent and fit physicians and surgeons. *Brown v. Brown*, 1 Haggard, 523; *Briggs v. Morgan*, 3 Phillimore 325; *Welde v. Welde*, 2 Lee 580; 2 Prob. and Div. 287; 3 Prob. and Div. 126; *Newell v. Newell*, 9 Paige 26; *Walsh v. Sayre*, 52 How. Pr. 334; *Schroeder v. Ry.*, 47 Ia. 375; *Ry. v. Thul*, 29 Kas. 466.

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Leonard Wilcox for respondent.

(1) There was no error in granting the commission to examine Dr. Staples on interrogatories. *R. S.*, 2157; *Basket v. Toosey*, 6 Madd. 261; Mitford's Eq. Pl. (1876) 241; *Prackett v. Dudley*, 1 Cow. 209; Weeks on Dep., sec. 176; *Forrest v. Forrest*, 3 Bosw. 669; 1 Greenl. Ev. (14 Ed.) sec. 320; *Ducket v. Williams*, 1 Crom. & J. 512. (2) The record fails to disclose any error by the court in refusing to compel the plaintiff to submit to further examination by surgeons. *Lloyd v. Ry.*, 53 Mo. 509; 1 Greenl. Ev., sec. 560; 2 Tidd's Prac. 802; *Roberts v. Ry.*, 29 Hun (N. Y.) 154; *Parker v. Enslow*, 102 Ill. 279; *Cook v. Manufacturing Co.*, 29 Hun 643; *Gartside v. Ins. Co.*, 76 Mo. 446; *Cook v. Lalance, etc.*, 29 Hun 643.

HENRY, C. J.—Plaintiff sued defendant to recover for personal injuries sustained by her, occasioned by a collision of a train of defendant's cars, in which she was a passenger, with another train. On the trial she had a judgment for four thousand dollars, from which this appeal is prosecuted.

But two errors are assigned which are here relied upon by appellant: First, that the court erred in granting the order to examine Dr. Staples upon interrogatories. Second. In refusing to order plaintiff to submit herself to an examination by competent and fit physicians and surgeons. As to the first point the statute provides as follows:

"Section 2144. When a party to any suit pending in any court of record in this state, shall make application to such court, in term time, or to the judge thereof in vacation, for a commission to take the examination of witnesses, and shall support the application by affidavit and shall have given to the adverse party reasonable notice

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of such application, the court or judge may, upon such terms as it may think proper, award such commission."

Section 2145 relates wholly to the appointment by the court of the office and the commands of the commission.

"Sec. 2146. The interrogatories shall be annexed to the commission, and shall be drawn and signed by the parties, or their counsel in the cause, under the sanction and direction of the court, or judge thereof."

This suit was begun July 9, 1881. The application for a commission to examine Dr. Staples was made February 10, 1882, and the trial commenced March 9, 1882. All the requisites for obtaining a commission to examine the witness, were complied with. Specific objections were made by the defendant to granting the order, but the court overruled them, sustained the motion, approved the interrogatories, and gave defendant until February 20, 1882, to file cross-interrogatories. This, defendant declined to do, insisting upon a right to cross-examine the witness, after hearing his answer to the interrogatories. The grounds upon which the plaintiff asked for the commission were, that the witness was a physician and surgeon, and had made an examination of plaintiff's injuries, and that his testimony was material to plaintiff's case. That the witness resided at Minona, in the state of Minnesota, and that it was difficult to fix any definite time, or place, to take his deposition, on account of his frequent absence from Minona.

The statute does not specify any state of facts upon which the commission is to be allowed, leaving that mainly to the discretion of the trial court, and we cannot say that that discretion was abused, or harshly, or oppressively exercised, in this case. A large discretion is also given to the court, as to the terms upon which it will grant the commission. No terms were prescribed by the court, except that the defendant should have ten days within which to file cross-interrogatories. The defend-

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ant's claim of a right to cross-examine the witness, after he had answered the interrogatories of the party taking his testimony, might, with equal propriety, be made in every case, and thus occasion the very delay and uncertainty in procuring the testimony which the above sections seem to have been intended to avoid. The right to cross-examine would carry with it the right to know when and where the witness would be examined, and at last drive the party to take his deposition. It would practically render the above provisions nugatory.

As to the second alleged error, on the seventh of March, 1882, before the trial, the defendant filed a motion as follows:

"The defendant herein would respectfully show the honorable court, that the plaintiff in this cause, as the defendant is informed and believes, claims to have received serious and permanent injuries to the coccyx, or terminal bone of the spinal column, by reason of the charge of negligence made herein in her petition. Defendant further avers that the true and real extent of plaintiff's said injuries, if any, can only be ascertained by a personal, physical examination of her by competent and skilled surgeons and physicans. Wherefore, defendant prays that this court, before proceeding with the trial of this cause, make a proper order in that behalf, requiring said plaintiff, Eliza T. Shepard, to submit to an examination by competent and skilled physicians and surgeons, that they may determine the true condition of her health, and the character and extent of her injuries, if any, in order that it may be known whether she is, or was, suffering from any disability, and if so, whether it originated from the cause claimed by her in her petition. Defendant further prays that if the court orders an examination, as hereinbefore prayed for, that it be made by a proper number of disinterested surgeons, one-half of whom shall be selected by the plalintiff, the other half by the defendant, with the privilege of those so

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selected to choose another disinterested surgeon, if they so desire, and that the said examination be had and conducted at the costs of this defendant."

In support of, and in connection with, said motion, defendant filed the affidavit of Dr. Jackson, to the effect that he was a physician and surgeon in the service of the defendant, and, as such, on the eighteenth of June, 1881, after the alleged injuries to plaintiff, made a personal examination of plaintiff, and that he believed that her injuries, then or now were, nor are, of the character and extent claimed by her, and that she sustained no injury at all, and that the truth of the matter could be ascertained by a proper personal examination of her, by competent and skilled surgeons. Plaintiff resisted said motion, alleging that, on the eighteenth of June, 1881, before this suit was commenced, she did submit to such an examination, which was fully and thoroughly made by said Jackson, who made his report to defendant, that there was no injury to the terminal bone of the spinal column. That she was in a precarious condition as to health, and feared the result of such an examination upon her health, prior examinations having caused her much pain and suffering, not only at the time, but for many days thereafter, but that she was willing to submit to an examination by Dr. J. K. Bauduy, of St. Louis, a physician and surgeon, skilled particularly in the kind of ailments of which she complained, provided that the examination should be only of the kind, and to the extent which, in his opinion, would not injure her health or endanger her life. The court, therefore, overruled defendant's motion.

There is a conflict between the authorities as to the right to compel a party to submit to any bodily examination. The authorities on this subject are cited in *Halfield v. St. Paul & Dakota Railroad Company*, 18 *American and English Railroad Cases*, 292, and in a note

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by the editor. In *Lloyd v. Railroad*, 53 Mo. 515, this court, Judge Napton delivering the opinion, said: "The proposal to the court to call in two surgeons, and have the plaintiff examined during the progress of the trial, as to the extent of her injuries, is unknown to our practice, and to the law. There was abundant evidence on this subject, on both sides, and any opinion of physicians or surgeons, at that time, would have only been cumulative evidence, at best, and the court had no power to enforce such an order." The reasons assigned in that case for refusing the order were probably sufficient, but we are not prepared to say, that, in no case, can such an order be made. Certainly, if the court can make the order, it will have no difficulty in enforcing it. Not that it can compel the party to submit to a personal examination, but it may dismiss a plaintiff's suit for a persistent refusal to do so; or, in case of either defendant or plaintiff, treat it as a suppression of testimony, and so present the matter to the jury as to make the refusal equivalent to proof of the fact, which the party asking such personal examination would make it probable, by affidavit or otherwise, the examination would disclose.

There are respectable authorities which hold that the court may order such personal examination. There are others to the contrary. We are inclined to hold with the former, but not that a party has an absolute right to have such a personal examination. It is a matter in which the court has a discretion which will not be interfered with unless manifestly abused. The case at bar is a fair sample of those in which it may and should be refused. The order asked by defendant was unreasonable in that it asked that this lady should submit to a personal examination, not by one skilled surgeon, but by at least three. It is with reluctance, and only from absolute necessity, that a lady of refinement ever submits to such a

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personal examination, even by her chosen physician, as defendant asked that this plaintiff should submit to. She had once submitted to such an examination by Dr. Jackson, and again offered to submit to an examination by an eminent and reputable surgeon and physician of the city of St. Louis, where the cause was pending, but this did not satisfy the defendant, who proposed to summon a number of physicians and surgeons to participate in the examination. If, and we have no reason to doubt it, plaintiff is a lady of refinement, she would rather have given up the cause, and dismissed her suit, than to have submitted to what the defendant proposed.

We think that her offer was a fair one, and that asked by defendant unreasonable. Defendant did not object to Dr. Bauduy, that he was not competent to make the examination proposed, or that he was biased or prejudiced against the defendant, but, so far as appears from the record, declined her offer, without stating any reason whatever for rejecting it. The judgment is affirmed. All concur.

McClelland v. The Picher Lead & Zinc Co.

MCCLELLAND *et al.* v. THE PICHER LEAD AND ZINC
COMPANY, *Appellant.*

Vendor and Vendee: CONTRACT, BREACH OF. Where a quantity of mineral is sold and part delivery made, and the vendee makes a resale to a third person of the residue in the vendor's hands without notifying the latter, it would be a breach of the contract for the vendor to deliver it to such third person. And if the vendee refuses to accept the residue, the vendor may sell it and recover of the vendee the difference between the contract price and that for which the mineral sold.

Appeal from Jasper Circuit Court.—HON. JOS. CRAVENS,
Judge.

AFFIRMED.

Harding & Butler for appellant.

Galen Spencer for respondents.

SHERWOOD, J.—Plaintiffs sold the defendant company three hundred thousand pounds of lead ore at a certain figure. Defendant received two hundred thousand pounds of the ore, but refused to receive the remainder, in consequence of which plaintiffs sold the same, and now sue to recover the difference between the contract price and that at which the mineral sold. The defendant company sold one hundred thousand pounds of the mineral to Murphy, but failed to notify plaintiffs of such sale, and consequently cannot complain that the mineral sold to Murphy was not delivered to him at his request. Such delivery, without notification of the fact of such proceeding from defendant to plaintiffs, would have been an unwarrantable breach of the contract by plaintiffs. The declarations of law given on the part of

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plaintiffs, and the one given on the part of defendant, put the case very plainly, and as the finding of the issues was for the plaintiffs, we affirm the judgment. All concur.

JACKSON COUNTY V. WALDO *et al.*, *Appellants*.**Taking of Private Property for Public Use: COMPENSATION.**

The judgment of the circuit court, that where commissioners appointed to ascertain the compensation of land taken for a public road, find that the advantages to the owner of the land equal the disadvantages, they should assess no damages, affirmed.

Henry, C. J., Dissenting.

Constitutional Law: TAKING OF PRIVATE PROPERTY FOR PUBLIC USE:

COMPENSATION: PUBLIC ROAD. Private property shall not be taken or damaged for public use without just compensation (Constitution, 1875, article 2, section 21), and until such compensation is ascertained and paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner therein divested. The finding of commissioners that the benefits derived from the location of a public road upon land will equal the value of the land taken, is not an ascertainment of a compensation which can be paid to the owner, or into court for the owner, and the owner cannot be deprived of his land until paid its cash value in money.

Appeal from Jackson Circuit Court.—HON. T. A. GILL,
Judge.

AFFIRMED.

The county court of Jackson county appointed three commissioners to assess the damages to certain lands of defendants over which it was proposed to locate a public

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road. The commissioners reported that, in their judgment, the advantages of the road to the land owners were equal to the disadvantages, and that they assessed no damages. Defendants moved to dismiss the cause, which motion was overruled. They then filed their objections to the proceedings, which were overruled, and the court ordered the report of the road commissioner to be received and approved, and the road to be established. The defendants appealed to the circuit court, where their motion to dismiss the cause was overruled.

Upon trial the court instructed the jury that they must consider the advantages, as well as the disadvantages, resulting from the establishment of the road, and if they found the advantages would exceed the disadvantages to the land of defendants, they should find for the county, and assess no damages, and that the burden of proving that the disadvantages exceeded the advantages, rested upon the defendants, and that advantages to be considered were those peculiar to land of defendants over other land in the neighborhood, and that general advantages, such as were common to the neighborhood, were not to be considered.

The court refused to instruct the jury: (1) That they must find for defendants the value of the land actually taken for the road, regardless of any advantage the road, if established, would be to the remaining land, and (2) That in estimating damages of defendants they should find value of land actually taken, and also cost of fencing defendants would be required to construct if road should be opened, and from cost of such fencing they should deduct the advantages (in money) that the road would be to defendants. The jury found a verdict for plaintiff and assessed no damages, and defendants appealed to this court.

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Johnson & Lucas for appellants.

Compensation to a property owner, whose property is taken or damaged for public use, must be ascertained by a jury. Until such compensation is paid to the owner, or into court for the owner, his property cannot be disturbed, nor his rights therein divested. Const. of 1875, art. 2, sec. 21. The word "paid" implies that money is to pass to the owner. How can advantages be "paid into court?" And yet, if this law is to stand, they must be. Another obstacle arises, from the fact that the owner's proprietary rights are not to be disturbed until he has been paid, so that it is literally impossible to pay him in "advantages" added to his remaining land before his rights are disturbed, because these "advantages" he does not, and cannot, get until the road has been opened for travel. *Jacob v. City of Louisville*, 9 Dana, 114; *Central Ohio Ry. Co. v. Holler*, 7 Ohio, 225; *Carpenter v. Jennings*, 77 Ill. 250.

Henry M. Withers and *E. P. Gates* for respondent.

(1) The right of the legislature to provide that damages for property taken for public use may be paid in benefits, has been too long the settled law of this state to be now questioned. *Newby v. Platte County*, 25 Mo. 258; *Garrett v. St. Louis*, 25 Mo. 505; *Uhrig v. City of St. Louis*, 44 Mo. 458; *State v. City of St. Louis*, 52 Mo. 574; *State v. City of St. Louis*, 62 Mo. 245; *City of St. Louis v. Speck*, 67 Mo. 403. (2) The presumption is that the commissioners appointed by the county court were qualified and competent to act. There is nothing to show that they were not. *Anderson v. Township Boone*, 75 Mo. 57. But this is immaterial, as the case was appealed from the county court to the circuit court, where the case was tried anew, as provided by section 6967 of

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Revised Statutes of 1879. The new trial being by a jury, who, under proper instructions given by the court, found for the respondent. Moreover, it has been expressly decided that it need not appear that the commissioners were free-holders. "It is presumable in such case that the court followed the statutes." *Sutherland v. Holmes*, 78 Mo. 402.

PER CURIAM.—The judgment of the circuit court is affirmed.

HENRY, C. J., DISSENTING.—I do not concur in the opinion of the majority of the court, for the following reasons: The commissioners appointed to assess damages to the owners of land through which it was proposed to open a county road, determined that Waldo's heirs would derive benefits equal to the value of their land to be taken for the road, and, therefore, refused to allow them any pecuniary compensation. If statutes permitting such a confiscation of private property for public use are in harmony with section twenty-one of our bill of rights, it is difficult to conceive why section sixteen, of the bill of rights of the constitution of 1865, was not retained in the constitution of 1875. Section sixteen, of the constitution of 1865, is as follows: "That no private property ought to be taken or applied to public use without just compensation." Section twenty-one, of the present constitution, reads as follows: "That private property shall not be taken or damaged for public use, without just compensation."

Such compensation shall be ascertained by a jury, or board of commissioners, of not less than three free-holders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner therein divested. The fee of the land taken for railroad tracks, without the

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consent of the owner, shall remain in such owner, subject to the use for which it was taken. The decision in *Newby v. Platte County*, 25 Mo. 258, under the constitution of 1865, was followed in subsequent cases arising under that constitution, and if the framers of the constitution of 1875 intended, by section twenty-one of the bill of rights, neither more nor less than was contained in section sixteen, of the bill of rights, of the constitution of 1865, why did they not adopt that section, to which a fixed judicial meaning has been given by repeated decisions of this court, authorizing the taking of private property for public use, by compensating the owner, not in money, but in such benefits as a jury might determine would result to his other property by the appropriation of a part of it for public use?

Such, it is contended, is just what is meant by section twenty-one of our present bill of rights. By that section the compensation is not to be ascertained, but paid "before the property can be disturbed, or the proprietary rights of the owner therein divested." How the benefits, which a jury or commission may ascertain, will result to the owner from the appropriation of his property to public use, "can be paid to the owner, or into court for the owner," before the road is completed for which it is taken, is beyond my comprehension, if such conjectural benefits are the compensation, or any part of the compensation, which the constitution imperatively requires shall be paid to the owner before his property is disturbed. That benefits to other land of the owner may be set off against disadvantages to such other land, I can understand, and that this is allowable may be conceded, but as to the actual value of the land taken, the owner cannot be deprived of it until paid its cash value, not in conjectural benefits, but in money. In this opinion Judge Sherwood concurs.

Riecke v. Westenhoff.

RIECKE V. WESTENHOFF *et al.*, Plaintiffs in Error.

Homestead, Mortgage of. It was not necessary, under 1 Wagner's Statutes, page six hundred and ninety-seven, section one, that the wife should join with the husband in executing a mortgage upon the homestead to make it valid ; but it is otherwise since the enactment of section 2689 of the Revised Statutes of 1879.

Error to St. Louis Court of Appeals.

AFFIRMED.

Kehr & Tittman for plaintiffs in error.

(1) The judgment, as to George Westenhoff, is against the evidence and the admissions of the pleadings. The pleadings admit, and the evidence shows, that he was not in possession of the premises, but was living with his mother as a member of her family. Being irregular as to one of the defendants, the judgment should be set aside as to both. *Mutual Life Insurance Co. v. Clover*, 36 Mo. 392. (2) If the first three instructions given by the court lay down correct rules of law, then upon the undisputed facts established by the evidence, the verdict and judgment should have been for the defendants, and the motion for new trial, in which this point was distinctly made, should have been sustained. *Wannell v. Kem*, 57 Mo. 482 ; *Bohan v. Casey*, 5 Mo. App. 107 ; *Sharpe v. McPike*, 62 Mo. 300 ; *Steffen v. Bauer*, 70 Mo. 397. (3) The instructions asked by defendant embody correct principles of law, and should have been given. (4) Instructions five and six, given by the court, are erroneous. (5) There is no evidence whatever to support the verdict for the plaintiff. The presumption that

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the certificate is true is destroyed when the facts upon which it is based are shown.

Broad head & Haeussler, and Liecester Babcock and C. V. Scott for defendant in error.

(1) The acknowledgment is at least *prima facie* evidence under the decisions of this court, and after the lapse of five years should be conclusive evidence of the facts therein stated, as against an innocent party. *Wannell v. Kem*, 57 Mo. 478; *Steffen v. Bauer*, 70 Mo. 399. (2) The widow cannot claim a homestead in the property her husband had conveyed in his lifetime, and which belonged to him—she having merely a dower right—nor as against a legal charge placed thereon by him. R. S., sec. 2693; *Lewis v. Curry*, 74 Mo. 52. (3) The widow, at best, could only have a right to dower, as the acknowledgment, as far as the husband is concerned, is not questioned; and, where the deed was to secure the payment of the purchase money, she does not even need to join, for she had no dower until it was paid for. *Creath v. Dale*, 69 Mo. 41. The jury were the sole judges of the testimony. *Wannell v. Kem*, 57 Mo. 478.

SHERWOOD, J.—Ejectment for lots in the city of St. Louis. Plaintiff became the purchaser of the lots at a sale under a deed of trust in January, 1879. The deed of trust bears date, and was acknowledged on June 1, 1872, by Caspar Westenhoff, and purported to be also acknowledged by his then wife, now widow, the present defendant. Her answer was a general denial, and, also, contained special matter to the effect that during her husband's life he and his family occupied the premises as a homestead; that she never acknowledged the deed of trust, and, therefore, the acknowledgment was void and

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that she, with her son, still continued to occupy the premises as and for their homestead. There was testimony, *pro* and *con.*, as to the fact of the wife having properly acknowledged the deed. The jury found for the plaintiff, and there was judgment in his favor which was affirmed by the St. Louis court of appeals.

It is unnecessary to go into the propriety of the instructions given or refused in the cause, as there is one point which dominates the whole matter. It is this: At the time the deed of trust was executed by Caspar, the husband, it was unnecessary that the wife should join in the conveyance of the husband in order to pass the homestead. *Lewis v. Curry*, 74 Mo. 49; 1 W. S., 697, sec. 1. Since then the law in that particular has been changed. R. S. 1879, sec. 2689. It is only where there is some special statutory or other provision making the wife's signature to the deed conveying the homestead essential, that she need join with her husband in executing such deed.

The result is that we affirm the judgment. All concur.

Williams v. Chariton County.

WILLIAMS, Plaintiff in Error, v. CHARITON COUNTY.

1. **Officers, Fees of.** No fees are allowed an officer, except where expressly given and allowed by law.
2. ——— : **ASSESSOR : LISTING OF DOGS.** Dogs are assessed in the list of personal property, and the assessor is allowed no increase in his emoluments for assessing them.

Error to Chariton Circuit Court.

AFFIRMED.

This case was submitted to the Chariton county circuit court on an agreed statement of facts, and upon that statement judgment was rendered in favor of respondent, from which plaintiff appealed.

This agreed statement shows that in the general election of 1876, plaintiff was elected assessor of Chariton county, for which place he duly qualified and entered on the discharge of its duties. That the legislature in 1877 passed a law making it the duty of the county assessor to list and register each and every dog over three months of age, owned or kept by any person on the first of August of that year and following years, which list and registration were required to be under oath and to be returned to the clerk of the county court in like manner as in the return of the assessment of personal property. That appellant, Williams, as such assessor, did list all dogs in his county during the term of his office, and return the same as he returned personal property, and he presented his bill for such services which was not paid by the county court, and that the services were worth what charged for, if any liability exists against the county.

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Kinley & Wallace for plaintiff in error.

When the law required the dogs to be listed the same as personal property, by implication, the officer listing them was entitled to his pay for such labor, the same as for returning lists of personal property, and it is on this basis that the charges were made. See Laws of 1877, p. 325, sec. 1. It certainly cannot be claimed that the legislature intended to compel an officer to do double work and not compensate him therefor.

O. W. Bell for defendant in error.

PER CURIAM.—Under the authority of the case of *Shed v. Ry. Co.*, 67 Mo. 687, no fees are allowed an officer except where expressly given and allowed by law. Moreover the compensation of assessors, except in St. Louis county, is fixed at a certain sum, and this sum includes all personal property assessed to one owner. Dogs being assessed in the list of personal property makes no increase in the emoluments of the assessor. See section 69, W. S. 1872, p. 1172. Therefore, judgment affirmed.

The State v. Gee.

THE STATE V. GEE, *Appellant*.

1. **Murder: MANSLAUGHTER: SELF-DEFENCE: INSTRUCTIONS.** A series of instructions upon the law of murder, manslaughter, and self-defence, approved.
2. **Evidence: PROVINCE OF JURY.** As a general rule positive testimony will outweigh that which is negative in its character, but it is for the jury to determine what weight they will give to all the testimony under the circumstances of a particular case.

Appeal from Cedar Circuit Court.—HON. CHARLES G. BURTON, Judge.

AFFIRMED.

The defendant was indicted for murder in the first degree, and on trial was convicted of murder in the second degree, and his punishment assessed at imprisonment in the penitentiary for the term of fifteen years. The court instructed the jury as follows:

“1. The court instructs the jury that the defendant is presumed to be innocent of the offence charged. That before you can convict him, the state must overcome that presumption by proving him guilty beyond a reasonable doubt. If you have a reasonable doubt of defendant's guilt, you must acquit him. But a doubt to authorize an acquittal must be a substantial doubt, founded on the evidence, and not a mere possibility of innocence.

“2. The jury are the sole judges of the credibility of the witnesses, and of the weight to be given to their testimony. In determining such credibility and weight, you will take into consideration the character of the witness, his manner on the stand, his interest, if any, in the result of the trial, his relation to or feelings toward the defendant or the deceased, the probability or improbability

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bility of his statements, as well as all the facts and circumstances given in evidence. In this connection you are further instructed that if you shall believe that any witness has knowingly sworn falsely to any material fact, you are at liberty to reject all, or any portion, of such witness' testimony.

“3. If you shall believe, from the evidence, beyond a reasonable doubt, that the defendant, at the time and place mentioned in the indictment, with a pistol, wilfully, deliberately, premeditatedly, and of his malice aforethought, shot and killed Peter Minnick, you will find him (guilty of murder in the first degree,) and so say in your verdict.

“4. If you shall believe, from the evidence, beyond a reasonable doubt, that the defendant, at the time and place mentioned in the indictment, with a pistol, wilfully, premeditatedly, and of his malice aforethought, but without deliberation, shot and killed Peter Minnick, you will find him guilty of murder in the second degree, and assess his punishment in the penitentiary for a term not less than ten years.

“5. Wilfully means intentionally, not accidentally. In the absence of qualifying facts or circumstances, the law presumes that a person intends the ordinary and probable result of his acts. If you shall believe, from the evidence, that the defendant, with a pistol, shot Minnick in a vital part and killed him, you will find that the defendant intended to kill him, unless the facts and circumstances given in evidence show to the contrary.

“6. Deliberately means in a cool state of the blood. It does not mean brooded over or reflected upon for a week, a day, or an hour, but it means an intent to kill, executed by the defendant, in a cool state of the blood, in furtherance of a formed design to gratify a feeling of revenge, or to accomplish some other unlawful purpose.

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and not under the influence of a violent passion, suddenly aroused by some provocation.

"7. Premeditatedly means thought of beforehand for any length of time, however short.

"8. Malice, as used in the indictment, does not mean mere spite, ill-will, or dislike, as it is ordinarily understood, but it means that condition of the mind which prompts one person to take the life of another without just cause or justification, and it signifies a state of disposition which shows a heart regardless of social duty, and fatally bent on mischief.) Malice aforethought means that the act was done with malice and premeditation.

"9. If you shall believe, from the evidence, that the defendant shot and killed Minnick while he, the defendant, was in a violent passion, suddenly aroused by opprobrious epithets, or abusive words spoken by Minnick to defendant, then such shooting and killing was not done with deliberation, and was not murder in the first degree. On the other hand, although defendant shot and killed Minnick while the defendant was in a violent passion, suddenly aroused by opprobrious epithets or abusive words spoken to him by Minnick, yet if such shooting and killing was done wilfully, premeditatedly, and of his malice aforethought, as heretofore explained, then defendant was guilty of murder in the second degree.

"10. If you shall believe, from the evidence, that the defendant shot and killed Minnick, while the defendant was in a violent passion, suddenly aroused by reason of Minnick having shoved or struck him with his hand or fist, you cannot find him guilty of murder in either degree, for in that case the law presumes that such shooting and killing was not done of defendant's malice, but by reason of such passion. On the other hand, although you may believe that defendant shot and killed Minnick while in a violent

passion, suddenly aroused by a shove or a blow from Minnick, yet, if you shall further believe, from the evidence, that such shooting and killing was not done in self-defence, as hereinafter explained, you will find him guilty of manslaughter in the fourth degree.

"11. If you find the defendant guilty of manslaughter in the fourth degree, you will assess his punishment at imprisonment in the penitentiary for two years, or by imprisonment in the county jail not less than six months, nor more than twelve months; or by a fine of not less than five hundred dollars, nor more than one thousand dollars; or by both a fine of not less than one hundred dollars and imprisonment in the county jail not less than three months.

"12. Although you may believe, from the evidence, that defendant shot and killed Minnick; yet, if you shall further believe, from the evidence, that such shooting and killing was done in self-defence, as hereinafter explained, you will acquit him.

"13. Upon the question of self-defence, the court instructs you that if at the time defendant shot Minnick, he, the defendant, had reasonable cause to apprehend a design, on the part of Minnick, to take his life, or do him some great personal injury, and that there was reasonable cause for him to apprehend immediate danger of such design being accomplished, and that to avert such apprehended danger, he shot, and that at the time he shot he had reasonable cause to believe, and did believe, that it was necessary for him to shoot and kill to protect himself from such apprehended danger, you will acquit on the ground of self-defence. It is not necessary that the danger should have been actual or real, or that the danger should have been impending and about to fall. All that is necessary is that defendant had cause to believe, and did believe, those facts. On the other hand, it is not

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enough that defendant should have so believed. He must have had reasonable cause to so believe. Whether or not he had reasonable cause is for you to determine, under all the facts and circumstances given in evidence. If you shall believe, from the evidence, that defendant did not have reasonable cause to so believe, you cannot acquit him on the ground of self-defence, although you may believe that the defendant really thought that he was in danger.

"14. The court instructs the jury that flight raises the presumption of guilt. And if you believe, from the evidence, that the defendant, after having shot and killed Minnick, as charged in the indictment, fled the country, and tried to avoid arrest and trial, you may take that fact into consideration in determining his guilt or innocence.

"15. If you find defendant not guilty, you will so say in your verdict.

Stratton & Stone for appellant.

(1) Manslaughter in the fourth degree, in this state, is the same as manslaughter at common law. Manslaughter at common law is where a person kills another upon a sudden transport of passion, or heat of blood upon a reasonable provocation. *State v. Edwards*, 70 Mo. 480; *State v. Holmes*, 54 Mo. 165; *State v. Ellis*, 74 Mo. 215. (2) There was no evidence upon which to base the fourteenth instruction. The court failed to define manslaughter in the fourth degree, as it should have done. *State v. Branstetter*, 65 Mo. 149. The verdict is not supported by the evidence. The Supreme Court will grant a new trial, if the conviction was not warranted by the evidence. *State v. Marshall*, 47 Mo. 378; *State v. Bond*, 1 Mo. 585; *State v. Mansfield*, 41 Mo. 470; *State v. Connell*, 49 Mo. 282; *State v. Packwood*, 26 Mo. 340; *State v. Burgdorf*, 53 Mo. 65.

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B. G. Boone, Attorney-General, for the state.

(1) Instruction number four properly defines murder in the second degree. *State v. Wieners*, 66 Mo. 13. Instruction number nine is a correct declaration of the law of the case. *State v. Testerman*, 68 Mo. 408; *State v. Lane*, 64 Mo. 319. Instruction number ten correctly defines manslaughter in the fourth degree. R. S., sec 1249; *State v. Branstetter*, 65 Mo. 149. (2) Instruction number fourteen was proper. Evidence of flight is always competent. *State v. King*, 78 Mo. 555.

SHERWOOD, J.—The defendant was indicted for murder in the first degree. Being tried, he was found guilty of murder in the second degree, and his punishment assessed at imprisonment in the penitentiary for the term of fifteen years. The circumstances detailed in evidence afforded sufficient basis for finding the defendant guilty of either degree of murder, or of manslaughter in the fourth degree, or of acquitting him on the ground of self-defence, and the instructions which the court gave placed the matter before the jury in the fairest possible light for the defendant, and he is without any just ground of complaint on that score.

Instruction number nine put the case to the jury on the theory of murder in the second degree, and instruction number ten was based on the theory of manslaughter in the fourth degree, detailing the facts, which, if proven by the evidence, would warrant the latter finding. It is impossible that the jury could have been misled as to what were the constituent elements of that degree of homicide. And it was proper that the court should base an instruction on the testimony of Moss, who did not see Minnick strike defendant a blow, or push him, before the fatal shot was fired, but did hear Minnick use abusive

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words to defendant before the latter shot him. The testimony of Moss, although in some sense of a negative character, he having, however, full opportunity of seeing the blow struck, if one was struck, was entitled to go to the jury for what it was worth, in connection with that of other witnesses, who spoke of abusive words, and was sufficient to base instruction number nine upon, notwithstanding several other witnesses testified that Minnick, at, or about, the time of using the words, also struck the defendant a blow, or blows. Although, as a general rule, positive testimony will outweigh that which is negative in its character, nevertheless, to the jury belongs the duty of determining for themselves what weight, considering all the circumstances, they would attach to the testimony of the various witnesses on the point in question. *Reeves v. Poindexter*, 8 Jones (N. C.) 308; *Henderson v. Crouse*, 7 *Ib.* 623; *State v. Phair*, 48 Vt. 366; Wharton on Crim. Evid., sec. 382; 1 Stark. on Evid., sec. 517.

It was proper, also, for the court to base instruction number ten alone on the hypothesis of blows having been given, and heat of passion engendered therefrom.

Finding no error in the record we affirm the judgment. All concur.

Tobin v. Bass.

TOBIN V. BASS *et al.*, Appellants.

1. **Deed, Delivery of:** ACCEPTANCE: PRESUMPTION. When a deed to a minor from its father, is absolute in form, and for its benefit, and the grantor voluntarily causes it to be recorded, acceptance by the grantee will be presumed, and such facts constitute a *prima facie* delivery of the deed, and raise a presumption which it will require clear proof to overthrow, that the grantor intended to part with his title.
2. The evidence in this case held not sufficient to rebut such presumption.

Appeal from Schuyler Circuit Court.—HON. ANDREW ELLISON, Judge.

REVERSED.

Higbee & Raley for appellants.

There was a sufficient delivery of the deed to the children of the plaintiff. *Lumber v. Anderson*, 13 Mo. App. 434; *Mayor v. Hill*, 13 Mo. 250; *Gorman v. Stanton*, 5 Mo. App. 585; *Dale v. Lincoln*, 62 Ill. 24; *Palmer v. Palmer*, 18 C. L. J. 78; *Long v. Joplin Mining Co.*, 68 Mo. 432; *Cecil v. Beaver*, 28 Ia. 241; *Adams v. Adams*, 21 Wall. 185; *McPherson v. Featherstone*, 37 Wis. 641; *Masterson v. Cheek*, 23 Ill. 76; *Devoise v. Snyder*, 60 Mo. 240; *Huey v. Huey*, 60 Mo. 694; *Gould v. Day*, 94 U. S. 412; *Burke v. Adams*, 80 Mo. 504.

Shelton & Dysart and *C. C. Fogle* for respondent.

(1) The making and recording of the deed to appellants, by respondent and her husband, in 1849, only raises a *prima facie* presumption of delivery, and this presumption is rebutted by the countervailing facts and

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circumstances in the case. *Younge v. Gilbeau*, 3 Wallace, 636; *Parmlee v. Simpson*, 5 Wallace, 81; *Knolls v. Barnhart*, 71 N. Y. 474; *Hawkes v. Pike*, 105 Mass. 560; *Jackson v. Phipps*, 12 Johnson, 418; *Yarnall v. Yarnall*, 6 Mo. 175; Martindale on Conveyancing, sec. 212; *Maynard v. Maynard*, 10 Mass. 455; *Creed v. Lancaster Bk.*, 1 Ohio 9, 10; *Cummings v. Bramhall*, 120 Mass. 564; *Shortliff v. Francis*, 118 Mass. 154. (2) The evidence abundantly shows that there was no delivery of the deed in controversy either prior or since the death of Geo. Tobin, respondent's husband, and under the facts in the case, the evidence failing to show a delivery to a third party for the use of appellants, there could be none after the death of one of the grantors. *Huey v. Huey*, 65 Mo. 689; Martindale Con. sec. 211. (3) And the presumption that deeds by parents to minor children, or deeds generally to idiots, lunatics and married women, and assignments for the benefit of creditors, from their beneficial character, are accepted by the grantees when found executed and recorded, as in this case, is only *prima facie*, and may be overthrown by countervailing circumstances. *Hawkes v. Pike*, 105 Mass. 560; *Yarnall v. Yarnall*, 6 Mo. 175; *Tomkins v. Wheeler*, 16 Peters, side p. 119; Martindale on Conveyancing, sec. 214; *Burke v. Adams*, 80 Mo. 504; *Maynard v. Maynard*, 10 Mass. 455; *Creed v. Lancaster Bk.*, 1 Ohio, 9, 10; *Cummings v. Bramhall*, 120 Mass. 564; *Shortliff v. Francis*, 118 Mass. 154. (4) There must have been a mutual concurrence of action at some time or other, between grantors and grantees, on the faith of a deed before a delivery can be said to have taken place. And in the case at bar the evidence shows conclusively that the grantees had no knowledge of the existence of the deed in controversy, until the institution of this suit, thirty-three years after the execution of the deed. *Gould v. Day*, 94 U. S. 405; *Jackson v. Cleveland*, 15 Mich. 94; *Brackett v. Barney*, 28 N. Y. 333;

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Burke v. Adams, 80 Mo. 504. (5) The deed in controversy having always been held by grantors, and its existence never made known to grantees, or any one else, and never delivered to any one for their use, or declared by grantors to be intended as a present operative conveyance cannot, under the circumstances of this case, operate as a transmission of title. *Fisher v. Hall*, 41 N. Y. 416; *Cummings v. Bramhall*, 120 Mass. 564; *Shortliff v. Francis*, 118 Mass. 154; *Maynard v. Maynard*, 10 Mass. 455.

NORTON, J.—This suit was brought to cancel a deed executed by plaintiff and her husband to the defendants, for the purpose of removing a cloud upon plaintiff's title. Plaintiff obtained judgment, from which the defendants have appealed. Since the rendition of the judgment plaintiff died, leaving a will, and the cause has been revived in the name of James L. Baker, executor. The following facts appear in the record before us, viz.: that George Tobin, who was the husband of plaintiff, in 1845, entered eighty acres of land in Schuyler county, in his own name, and one hundred and sixty acres in the name of his wife. The evidence tends to show that this land was entered by Tobin with money which his father, who died in Kentucky, had willed to Tobin's children. On the twenty-fourth of August, 1849, Tobin and wife executed a deed conveying the said two hundred and forty acres of land to their children, six in number, four of whom were minors, one of unsound mind, and another being married, and all of whom lived with their parents on the land, except the married daughter, who lived about twelve miles distant. The consideration named in the deed was five dollars, and natural love and affection. The deed was duly acknowledged before the circuit clerk, filed for record, and duly recorded. After the deed was recorded Tobin took it to his house, where it remained with his other papers till his death, which occurred in

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1878, and being then discovered, Mrs. Tobin, the plaintiff destroyed it by burning it up. Alvra, the oldest child, and of unsound mind, and Melvina, another of the children, have always lived with their parents on the land.

After the execution and recording of the deed, Tobin and wife lived upon the land as before, exercising acts of ownership over it, receiving the beneficial use of it, and paying the taxes upon it. Ellen, one of the children, married John Haney in 1856, and Tobin and wife told him on the day of the marriage that he had made forty acres of land that day. This witness testified that after the war, by direction of Tobin and wife, he selected forty acres of the land, improved it and lived on it till 1881, when he left it to avoid trouble. Trabur, who married Josephine, another daughter, joined her in conveying one-sixth interest in the land, in October, 1854, to said Tobin, and in 1856, plaintiff joined her husband in a deed re-conveying the same back to Josephine, Tobin saying to Mrs. Tobin, after the deed was made, "that it was all fixed now; Josephine stands like all the rest of the children." Plaintiff, who, at the time of the trial, was about eighty years old, testified that she did not execute the deed to Josephine in 1856, nor the deed to the children in 1849.

There was no actual manual delivery of the deed, acknowledged and recorded in 1849, and in consequence of the failure of the clerk to index the deed, the fact that it was recorded was unknown till about six months after the destruction of the deed by plaintiff, when it was discovered by Mr. Graves, to whom she proposed to sell the hundred and sixty acres which had been entered in her name. There was evidence tending to show that Mrs. Tobin always claimed this land, and also evidence that Tobin spoke of it repeatedly as land belonging

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to the children, and also evidence tending to show that the children understood the land to be theirs, although there is nothing to show, outside of this common understanding, that they had knowledge of the deed, till after the death of their father. The circuit court found that the deed of 1849 was duly acknowledged, filed for record and recorded, but held that it had never been delivered. So that the decisive question on the facts disclosed, is whether there was such delivery as to pass the title.

While the delivery of a deed is necessary to make it effectual in passing title, it is established by the following authorities, that when a deed to a minor child is absolute in form and beneficial in effect, and the father and grantor voluntarily causes the same to be recorded, acceptance by the grantee will be presumed, and such facts constitute, *prima facie*, a delivery, and affords reasonable presumption that the grantor intended to part with the title, and that clear proof should be made that a person who, under such circumstances, has executed, acknowledged and caused a deed to be recorded before the court would be warranted in declaring that he did not intend to part with his title: *Cecil v. Beaver*, 28 Iowa, 242; *Robinson v. Gould*, 26 Ia. 89; 3 Wash. Real Prop. (3 Ed.) 261; *Masterson v. Cheek*, 23 Ill. 72; *Mitchell v. Ryan*, 3 Ohio St. 377. We are of the opinion that the plaintiff has failed to make such proof as would authorize us to declare that it was not the intention of the grantors to part with their title in the land conveyed to the defendant.

At the time the deed was made and put upon record four of the grantees were minors, one of unsound mind, and another married, living with her husband, some distance from the grantors. Although Mrs. Tobin testified that her husband gave her two hundred dollars, with which he entered the land in her name, it appears from her own evidence that the money thus bestowed upon

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her was not her husband's, but money of the children, which came from their grandfather in Kentucky. It was, therefore, but an act of justice due from the father and mother to convey the land thus entered to their children, the equitable owners, and we attach but little importance to the fact that, under these circumstances, the possession of the deed was retained by the father after it was recorded. *Payne v. Troyman*, 68 Mo. 339. It has been held by respectable courts that under such circumstances the father, as to his subsequent possession of the deed, is the mere custodian for the child. *Masterson v. Check*, 24 Ill. 77.

These facts, in connection with the further fact that Tobin accepted a conveyance in 1854 of the one-sixth interest in this land from one of his daughters, a grantee in the deed of 1849, and in 1856, in conjunction with plaintiff, re-conveyed the land to the daughter, and the further fact which the evidence of witnesses Tobin, Morris, Bass and Haney tended to establish, that the children understood that the land was theirs, and that the father repeatedly said in the presence of plaintiff that the land belonged to the children, and the refusal of Tobin and wife to sell Trabur one forty acres of this land, and Morris another forty acres in 1866, putting their refusal on the ground that the title was in the children, the *prima facie* case arising from recording the deed, is so strengthened as not to be overcome by the fact that Tobin remained in possession of the deed and land, enjoying its profits, exercising acts of ownership over it till his death, in 1878.

For the reasons given the judgment will be reversed and the bill dismissed. All concur.

Hughes v. Burri:s.

HUGHES *et al.*, Appellants, v. BURRISS *et al.*

1. **Will, Probate of in Common Form :** SETTING ASIDE WILL IN CIRCUIT COURT ON CONTEST IN SOLEMN FORM : INTERMEDIATE CONVEYANCE. A testatrix died seized of real estate, which, by her will, she devised to her husband. The will was duly admitted to probate in the probate court, but afterwards, in a proceeding by the heirs of the testatrix instituted under the statute (R. S., sec. 3980) within five years after the probate in the probate court, the will by the judgment of the circuit court was declared not to be the will of the deceased ; *held*, that a conveyance of the land by the husband, after the probate in the probate court and before the institution of the suit by the heirs to contest the validity of the will, passed no title.
2. **Life Tenant : WASTE.** A life tenant or his lessee will be enjoined from committing waste at the suit of the owner of the fee.

Appeal from Pettis Circuit Court.—HON. J. P. STROTHER, Judge.

REVERSED.

B. G. Boone and E. J. Smith for appellants.

The proceeding from the presentation of the will in the probate court, till final judgment declaring it was not her will in the circuit court, was one proceeding. Morse and Burri:s bought *pendente lite*. They bought subject to the result of the suit and as it resulted in establishing there was no will, they holding under the will took nothing. *Dickey v. Malechi*, 6 Mo. 177 ; *Benoist v. Murrin*, 48 Mo. 48 ; *Tapley's Adm'r v. McPike*, 50 Mo. 589.

Philips & Jackson for respondents.

(1) Courts of probate and none other have jurisdiction in the first instance, to admit to probate and pass

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on the existence and validity of the last will and testament of one deceased. As such, their judgments cannot be collaterally assailed. They are, until set aside, in a direct proceeding, therefore, as binding and conclusive as the judgment of the highest courts in the land over any subject matter within their jurisdiction. *Banks v. Banks*, 65 Mo. 432; *Dilworth v. Rice*, 48 Mo. 124; *Patten v. Tallman*, 27 Me. 27; *Grignon's Lessee v. Astor*, 2 How. 319; *Davis v. Gaines*, 14 Otto, 386; *Wyman v. Campbell*, 6 Port. (Ala.) 220; *Ballou v. Hudson*, 13 Gratt. 682; *State v. McGlynn*, 20 Cal. 233. (2) It is well established law that while the title of a plaintiff, or party to a judgment, will be forfeited by a subsequent reversal or annulment of the same, yet the title of a stranger who purchases in good faith from the beneficiary under the judgment will not be affected thereby. *Vogler v. Montgomery*, 54 Mo. 577; *Gott v. Powell*, 41 Mo. 420; *Voorhees v. Bank*, 10 Pet. 475; *Gray v. Brignarallo*, 1 Wall. 634. So, while it is true, if the title had remained in Roley, the devisee, until the will was declared void by the decree of the circuit court, the property would have been restored to the contestants, yet having been conveyed by the devisee during the existence and force of the judgment of probate to an innocent purchaser for value, the title is gone from the heirs. (3) It is said by appellant that the judgment of probate is *ex parte*, without notice, in fact, to the heir, and that no judgment is binding without notice to the party affected thereby. Ordinarily this is true. But they are judgments *in personam*. The proceedings in the appointment of administrators and the probate of wills are essentially proceedings *in rem*. They are against and bind the property itself, the *res*. The heir is presumed to know of the death of the ancestor. He is not a necessary party to the proceedings, for the court, *pro bono publico*, takes jurisdiction of the matter to preserve the estate. It acts on the thing itself, and its judgment, for the time

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being, binds the property. This is the recognized law. *Garvin's Adm'r v. Williams*, 50 Mo. 212; *Wyman v. Campbell*, 6 Port. (Ala.) 232; *Dilworth v. Rice*, 48 Mo. 124; *Grignon's Lessee v. Astor*, 2 How. 319. (4) The question in this case was directly passed on and favorably to respondent in *Steele v. Renn*, 50 Tex. 467. To the same effect are the cases of *State v. McGlynn*, 20 Cal. 268, and *Davis v. Gaines*, 14 Otto, 396.

NORTON, J:—On the twentieth of September, 1872, one Emily Roley died seized in fee of certain real estate in Henry county, Missouri. She made a will devising this land in fee to her husband, John I. Roley. At the November term, 1872, of the probate court of Henry county, this will was duly presented and admitted by said court to probate. There was born alive of said marriage between said Emily and John Roley a child, which gave him, aside from the devise, a life estate by the curtesy in said land. In October, 1875, said John Roley, by deed of warranty, sold said land to one C. C. Morse for value received. On the first day of February, 1876, said Morse leased said land to the defendant, James M. Burriss, and another, as coal land for mining purposes, for a term of three and one-third years thereafter. The interest of said second party in said lease passed by trade to one of the other defendants, the brother of said James Burriss. The Burrisses, after much prospecting, discovered valuable coal deposits, and at once began mining operations thereon. In the fall of 1876, the plaintiffs, as heirs at law of said Emily Roley, instituted suit in the probate court of said county to set said will aside. The cause by consent was transferred to the circuit court of said county, as the probate court had no jurisdiction to try such issue, where on a contest between them and said John Roley, the will was declared not to be the last will and testament of said Emily Roley.

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On the ninth of November, 1878, the plaintiffs brought this action against the defendants who were mining on said land under said lease, to enjoin them as trespassers committing waste on the freehold. The cause was transferred by change of venue to the Pettis circuit court, where it was heard. The court dissolved the injunction and dismissed the bill. A jury was empaneled and assessed the defendants' damages consequent upon the injunction. From these judgments the plaintiffs prosecute this appeal.

The question decisive of this case under the facts above stated is, was the deed of John Roley, executed in 1875 after the will of Emily Roley was admitted to probate by the probate court, effectual to pass the fee in the land mentioned to Morse, the grantee, as against the heirs of said Emily, notwithstanding said will was declared not to be the will of said Emily by the judgment of the circuit court, in a proceeding in said court instituted by the heirs contesting the validity of the will within five years after the order of the probate court admitting the will to probate was made? An affirmative answer to this question affirms the judgment and a negative answer reverses it. This question is, we think, solved by our statute relating to wills and their probate, and the construction put upon it by adjudications of this court hereinafter referred to. It is provided by section 3972, Revised Statutes, that the probate court or clerk thereof in vacation, subject to the confirmation or rejection by the court, shall take proof of last wills. "When any will is exhibited to be proven, the court or clerk may immediately receive the proof and grant a certificate of probate, or, if such will be rejected, grant a certificate of rejection."

It will be perceived that under these sections any person may present, either to the probate court, or its clerk in vacation, a will for probate, without being re-

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quired to give any notice whatever to any party interested in the probate or rejection thereof. No right is given by the statute to any such party to appear and contest the proceedings, either before the court or clerk, but the whole proceeding is *ex parte* and without notice, and no appeal is given from the action of the court in admitting or rejecting the will. We think it is clear from sections 3980, 3981, and 3982, of Revised Statutes, that it was not the design of the legislature to make the action of the probate court in such a proceeding final and binding on the parties interested. The said sections are as follows: "Section 3980. If any person interested in the probate of any will, shall appear within five years after the probate or rejection thereof, and by petition to the circuit court of the county, contest the validity of the will or pray to have a will probated which has been rejected, an issue shall be made up whether the writing produced be the will of the testator or not, which shall be tried by a jury, or, if neither party require a jury by the court." Section 3981: "The verdict of the jury, or finding of the court shall be final, saving to the court the right of granting a new trial as in other cases and to either party an appeal in matters of law to the Supreme Court, or St. Louis court of appeals." Section 3982 provides that: "If no person shall appear within the time aforesaid, the probate or rejection of such will shall be binding, saving to infants, married women, or persons of unsound mind a like period after their disabilities are removed." We understand these statutory provisions to mean that an *ex parte* order, such as the probate court is authorized to make in admitting a will to probate, shall not be conclusively binding on the parties interested till after the expiration of five years from the time such order is made, nor conclusively binding on parties interested if they are infants, married women, or persons of unsound mind, till after the expiration of a like period after their respective

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disabilities are removed. As to such parties the legislature in the sections above quoted has characterized the force and effect to be given to the order of a probate court probating a will, and we are not authorized to give such order any greater force or effect.

In the case of *Dickey v. Malechi*, 6 Mo. 177, decided in 1829, this court, speaking through Judge Napton, observed in reference to a petition filed to establish a will which had been rejected by the county court: "I do not see that the circuit court, in entertaining the petition of Malechi, did exercise any original jurisdiction. * * * The legislature may undoubtedly provide other modes besides the ordinary form of appeal by which the controlling power of the circuit court may be exercised, and in the tenth section respecting wills and testaments they have made such a provision." The tenth section referred to in the opinion corresponds with section 3980, *supra*. So in the case of *Benoist et al. v. Murrin et al.*, 48 Mo. 48, in speaking of the effect of a petition to contest a will it is said: "The effect of the contestants' petition and the proceedings under it was to transfer the subject matter from the probate to the circuit court for adjudication in the latter court. There was no appeal in form, but the result of the process was the transference of the contest from an inferior to a superior court, and that may be done without a formal appeal, as was decided by this court in *Dickey v. Malechi*, 6 Mo. 182, and where it was held that the jurisdiction of the circuit court, in cases like the present, was not original. The jurisdiction not being original, it must be derivative in effect, as on appeal." So in the case of *Lamb v. Helm*, 56 Mo. 432, it is said: "When a contest is commenced under our statute, * * * either to establish a will which has been rejected * * * or allowed and probated in the probate court, the effect is the same as if an appeal had been taken from the action of the probate court to the circuit court

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where the question could be tried anew, just as if no action had been taken in the probate court. The party who relies on or asserts the validity of the will must prove it up in the same manner and to the same extent as if no action had been taken by the probate court; in fact, the action of the probate court becomes wholly void by such contest so far as the efficacy of the will is concerned. The effect of the contestants' petition and proceedings under it was to transfer the whole matter to the court where the proceedings are pending."

So in the case of *Tapley et al. v. McPike*, 50 Mo. 589, it is said: "While the will remained in force, the proceedings of the county court were regular, but they were not final. The law allows five years to contest the validity of a will in the circuit court. The contesting of the will in the circuit court operates in the nature of an appeal from the probate in the county court. Till the time has elapsed and gone by for proceedings in the circuit court, the will is not conclusively and finally established. Till then the right of the heirs is not concluded. * * * I am, therefore, inclined to the opinion that the statute will not begin to run against them till their right to appear and proceed in the circuit court has been lost, or the judgment probating the will has become absolute." In the case of *McIlwraith v. Hollander*, 73 Mo. 105, at page 113, it is expressly held that the devisee under a will proven in common form, acquired no right to convey the property devised, and that the effect of a suit instituted in the circuit court to contest the validity of such will was to annul the action of the probate court and that the devisee had no more authority to convey than if the will had never been presented to the probate court.

It is clear that if the statute had provided for an appeal from the order of the probate court admitting the will in question to probate, and the heirs of Mrs. Roley

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had appealed therefrom, and that Roley, the devisee under the will, had, during the pendency of the proceeding, sold and conveyed the land devised, that his vendee would be a *lis pendens* purchaser, and in the event of the writing purporting to be the will of Mrs. Roley being declared not to be her will, such purchaser would take nothing by virtue of *his purchase*, except what Roley owned independent of and outside the will. And if, as has been held in the cases above cited, the effect of the institution of proceedings by plaintiffs to vacate the will, was the same as if on appeal, we cannot perceive why the same result should not follow. We have been cited to quite a number of authorities establishing the doctrine that a purchaser at a judicial sale, which is supported by the judgment of a court of competent jurisdiction in force at the time of the sale, will be protected in his purchase, even though the judgment should afterwards be reversed on appeal or writ of error. While the principle asserted in these cases is established law, it cannot be invoked in the case at bar for the reason that the sale made by Roley to Morse was not a judicial sale and does not rest for support on any judgment or decree of a court authorizing or directing him to sell. The sale in this case was under the will and made mere *mortu* of the devisee. In the case of *Gaines v. New Orleans*, 6 Wall. 642, the above distinction is clearly recognized, and also in the case of *Davis v. Gaines*, 104 U. S. 386. While the order of the probate court in admitting a will to probate is a judicial act, not open to collateral attack, as is held in 31 Mo. 40; 43 Mo. 13; 48 Mo. 130, and 65 Mo. 433, such order does not become absolute as to those who have a right to contest the will till after the lapse of the time in which they have under the statute a right to contest it. *Tapley et al. v. McPike*, *supra*.

We have also been cited to the cases of *State v. McGlynn*, 20 Cal. 268, and *Steele v. Renn*, 50 Tex. 467, to

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establish the proposition that the purchaser from a devisee, under a will admitted to probate and before the order probating it is set aside and the will declared void, will be protected in his purchase. The Texas case decides this, but it is to be observed that the Texas statute is unlike ours in this, that it provides for notice to the parties interested in the first instance and they have their day in court, and besides this, it contains no such provision as section 3982, of our Revised Statutes. The case referred to is not, therefore, even persuasive authority in controlling our decision, based upon our own statute, especially so in view of the construction put upon it by this court in the cases hereinbefore referred to.

We are of the opinion that a negative answer must be returned to the question propounded in the beginning of this opinion, which results in the reversal of the judgment and the further holding that a life tenant, or his lessee, will be enjoined and restrained, on the petition of the owners of the fee from committing waste. We have not considered the question of estoppel raised in the pleadings for the reason that the bill of exceptions shows that it was admitted "that the plaintiffs are entitled to have the injunction made perpetual, unless defendants can show a title in fee to said lands as the grantees of John S. Roley, who was the husband of said Emily F. Roley, and entitled only to a life estate as tenant by the curtesy, unless he was entitled to more under the will of said Emily, and then his rights under said will are such as the court may find them to be under the evidence."

Judgment reversed, and cause remanded to be proceeded with in conformity with this opinion. All concur.

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THE STATE v. HALL, *Appellant*.

1. **Criminal Law : LARCENY OF DEED : INDICTMENT.** In an indictment under Revised Statutes, section 1312, for the larceny of a deed, the same particularity of description is not necessary as in charging its forgery. If the statutory term is employed in designating the instrument charged to have been stolen, no more minute description is requisite than the common law requires in an indictment for the larceny of an ordinary chattel. It is sufficient to describe the instrument by any name by which the same may be usually known. R. S., sec. 1814.
2. — : — : —. An indictment for the larceny of a deed need not mention the name of the grantee in the deed. And the term "deed" imports a complete instrument.
3. — : — : — : **VALUE : OWNERSHIP.** In an indictment under Revised Statutes, section 1312, for the larceny of a deed, it is not necessary to allege that it was of any value. And said section is broad enough to cover the larceny of deeds not delivered, and wills not probated. The indictment in such case may charge the property as either the bailee's or the bailor's, or as the thief's, or true owner's, at the election of him who draws it.
4. — : — : **EVIDENCE : TAKING : INTENT.** Where one obtains possession of a deed of release under the pretense that it was only for a temporary purpose, and, after so securing possession of it, has it placed upon record, this is such a trick or artifice as amounts to a constructive taking and is evidence of an original felonious intent.
5. — : **INTENT.** The intent with which one does an act is properly presumed to be that which was its natural consequence, and may be gathered from his subsequent conduct, conversations and letters in relation to such act.

Appeal from Jackson Criminal Court.—HON. H. P. WHITE, Judge.

AFFIRMED.

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Frank Titus for appellant.

It is alleged the instrument stolen was a deed. There can be no deed without a grantee, and there is no sufficient description of the instrument. *State v. Kroeger*, 47 Mo. 530; *State v. Fay*, 65 Mo. 490; *State v. Page*, 19 Mo. 213; 3 Wash. on Real Prop. (3 Ed.) 236; 1 Bouvier, 387. The value of the property affected is alleged to be two hundred dollars, and the value of the deed should have been charged to be the same. R. S., sec. 1310; *State v. Krieger*, 68 Mo. 98. Defendant's objection to Ford's statement of what defendant stated to him about or before the taking of the deed, about selling his or his wife's property should have been sustained. *Gamble v. Johnson*, 8 Mo. 606; *State v. Dominique*, 30 Mo. 585; 1 Taylor's Evidence, secs. 586, 587; 21 Alb. L. J. 484, 504. The instruction asked at the close of the state's case should have been given. There was a failure to show any criminal taking or larcenous intent. *Johnson v. State*, 19 Cent. L. J. 114. The first instruction for the state was erroneous. There was no evidence warranting an inference of felonious taking. *Witt v. State*, 9 Mo. 671. The second instruction erroneously declares that although defendant obtained the deed with Ford's consent, yet, if he converted the same to his own use, he is guilty. *Burnside v. Twitchell*, 43 N. H. 390; *Williams v. Given*, 6 Gratt. 268. The court should have told the jury what constituted a conversion. *State v. Sims*, 71 Mo. 540.

D. H. McIntyre, Attorney General, for the state.

The deed was sufficiently described by its name and purport. R. S., 1879, sec. 1814. It was not necessary to allege that the deed was of any value. Sec. 1814,

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supra; R. S., sec. 1312. The ownership was properly laid in Jonathan Ford. He was in lawful possession when the deed was taken by defendant, and possession is sufficient ownership. It is not necessary to prove that the person alleged to be the owner has the legal right to the property. *State v. Schatz*, 71 Mo. 502.

SHERWOOD, J.—I. The defendant was indicted for the larceny of a deed charged to be the property of Ford. The indictment is bottomed on section 1312, Revised Statutes, and is sufficient, as it pursues the language of the statute and states all the constituent elements of the offence in question. The same particularity of description is not required where the larceny of an instrument is charged as where it is forgery. In the former case, if the statutory term is employed in designation of the instrument, no more minute description is requisite than the common law requires in an indictment for the larceny of an ordinary chattel. Bishop on Stat. Crim., sec. 691. Besides, section 1814, Revised Statutes, 1879, in express terms declares that: "In any indictment for * * * stealing * * * any instrument or property, it shall be sufficient to describe such instrument or property by any name or designation by which the same may be usually known." This disposes of the objection that the indictment does not mention the name of the grantee in the deed. And the term "deed" imports *ex vi termini* a complete instrument. *State v. Fisher*, 65 Mo. 437.

And the indictment is so full in other particulars as to the description of the property to be affected by the instrument alleged to have been stolen, and as to the parties thereto, and other descriptive incidents, that no doubt can arise that the indictment fully informed the defendant of the "nature and cause of the accusation." An indictment similar in form to the one at bar is framed

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on the British statutes in regard to stealing writings relating to real estate. 2 Arch. Crim. Plead. & Prac. 1253. And under the provisions of section 1312, *supra*, no necessity existed to allege that the instrument charged to have been stolen was possessed of any value. The plain object of the section was to protect from larcenous hands wills, deeds or instruments of writing, being or purporting to be the act of another, by which any right or interest in real or personal property shall be or purport to be transferred, or conveyed, or, in any way, changed or affected. The section is broad enough and precise enough to extend its statutory protection over a deed, whether the right or interest therein mentioned has become consummated by reason of the delivery of the deed or not. Indeed, it must be obvious that many of the evils the statute designed to prevent would not be prevented if such a narrow view were to be taken of its scope and meaning as would place outside of its domain and jurisdiction a deed not delivered or a will not probated. And it was proper for the indictment to lay the property in Ford. He was the bailee of the deed of release, had a qualified property therein, and this was sufficient. The indictment in such cases may charge the property as either the bailee's or the bailor's, or as the thief's, or as the true owner's, at the election of him who draws the indictment. 2 Bishop's Cr. Law, secs. 789, 826.

II. As to the evidence in the cause, if the testimony of Ford is to be credited, it furnished, with its accompanying papers, plenary proof of the crime charged. And if defendant obtained possession of the deed of release under the pretense that it was only for a temporary purpose, and, thus securing possession of it, had it placed upon record, this was such a trick or artifice as amounted to a constructive taking and was evidence of an original felonious intent. 3 Greenleaf on Evidence, sec. 160; 1 Bishop Crim. Law, sec. 583; Roscoe's Crim. Evid., 623, 626; 2 Arch. Crim. Pl. &

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Prac. 1201. And the intent of the defendant was properly presumed to be that which was the natural consequence of the act with which he was charged. 1 Arch. Crim. Pl. & Prac. 366; 3 Greenl. Ev., secs. 13, 14, 18. The intent of the defendant could also be gathered from his subsequent conduct and conversations in reference to the deed of release, and his letter to Tuttle, of July 8.

And the letter of Tuttle to Ford, of May 17, which enclosed the note of two hundred dollars, and requested the collection and remittance of the amount, and interest, and the delivery of the release, cannot admit of but one construction, *i. e.*, that the collection of the note was *first* to occur, and *then* the delivery of the deed. No one accustomed to business transactions, or worthy to be entrusted with them, but would know that the collection of the note was a *condition precedent* to the delivery of the deed of release. The point is too plain for discussion. The evidence on the part of the defendant showed him to be innocent of the crime or of any criminal intent, but this was a matter to be weighed by the jury, together with the evidence offered by the state. *State v. Musick*, 71 Mo. 401; *State v. Cook*, 58 Mo. 548.

III. Relative to the instructions, those given on the part of the state, and by the court, of its own motion, placed the issues in the cause very fairly before the jury, and left nothing to be desired. Indeed, the first and second instructions given by the court at its own instance, are, perhaps, too favorable to the defendant.

Finding no error in the record, the judgment is affirmed. All concur.

The Springfield Ry. Co. v. The City of Springfield.

THE SPRINGFIELD RAILWAY COMPANY, *Appellant*, v.
THE CITY OF SPRINGFIELD *et al.*

1. **Municipal Corporations: CONTRACTS BY: INVIOLEABILITY OF.** Where a city, by its ordinance, makes a contract, and the same is accepted and acted on by the other party, it cannot abrogate such contract at pleasure, or destroy the rights so given and acquired.
2. ———: **ORDINANCES, VALIDITY OF.** While a city council may pass such ordinances as may to it seem best, yet it is for the courts to determine their validity.
3. **Contract, Breach of: EQUITY.** Where the damages arising from a breach of contract are not capable of fair estimation, and are such as cannot be fully compensated by an action at law, equity will interfere to restrain such breach.
4. **Equity: FRANCHISE.** Equity will interfere to protect and secure the enjoyment of a franchise given by statute, because it affords the only plain and adequate remedy for the wrong.
5. ———: ———. Equity will protect rights of a like character acquired under city ordinances.
6. **Municipal Corporations: RAILWAYS, REGULATION OF.** A city council, by granting to a railway company the privilege of constructing its road over its streets and public squares, does not lose the right to subject the company to reasonable regulations, both in the conduct of its business, and in the location of its track over the places authorized by its ordinance.

Appeal from Greene Circuit Court.—HON. W. F.
GEIGER, Judge.

REVERSED.

John O' Day for appellant.

(1) The ordinance of the city of Springfield, when accepted by the appellant, became a contract, binding upon the municipality. *Milhan v. Sharp*, 27 N. Y. 620;

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City of Quincy v. Bull, 106 Ill. 337; 1 Potter on Corporations, secs. 376, 395; *Bailey v. Mayor*, 3 Hill, 530; *Lloyd v. Mayor*, 5 N. Y. 375; *Indianapolis v. Gas Company*, 66 Ind. 406; *Burlington v. Burlington Street Ry. Co.* 49 Ia. 144; *Mayor v. Railroad*, 32 N. Y. 261. "Upon the acceptance of the provisions of the ordinance it became a contract between two parties binding each to the observance of all of its provisions." *Milhan v. Sharp, supra*. "We see no more involved here than the simple law of contract, whether a municipality may at its will repudiate the obligations of a contract which it has made." *Quincy v. Bull, supra*. (2) The appellant had the right to select any route through the public square which it deemed best, in its discretion, and when selected and its railway constructed thereon, its right to such right of way became vested, and the city could not arbitrarily interfere therewith. *Struthers v. Railway*, 87 Pa. St. 282; *Parke's Appeal*, 64 Pa. St. 137; *People v. Railway*, 74 N. Y. 302; Rorer on Railroads, 278; *Hogancamp v. Railway*, 17 N. J. 84. (3) The appellant had a property in the street, a franchise of value, and was entitled to its peaceable enjoyment. *Chicago v. Baer*, 41 Ill. 306. (4) Where a party claims a franchise under grant, and is in possession of such franchise, equity will interpose to protect and secure the enjoyment of such franchise. *Railroad Company v. Railroad Company*, 69 Mo. 72; *Water Power Co. v. Railroad Co.*, 16 Pick. 525; *Turnpike Co. v. Miller*, 5 Johns. Ch. 101; *Railroad Co. v. Tunnel Co.*, 10 C. E. Green, 384; *Gurney v. Ford*, 2 Allen, 576; *Denver v. Mullen*, 4 A. & E. Ry. Cases, 304; *Railroad Co. v. Screven*, 45 Ga. 613; Rorer on Railroads, 512; Dillon on Municipal Cor. (2 Ed.) sec. 512. (5) The threatened acts could not be justified on the pretense that they were to be done in the exercise of the city's police power, or control over its streets, for these powers only

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regulate, they do not impair. Cooley's Const. Lim. (1 Ed.) 577. (6) No rule of right is better settled than that, for the protection of rights granted under contract or legislative grant, equity will lend its aid as the only plain and adequate remedy. *Street Railroad Co. v. Street Railroad Co.*, 69 Mo. 68.

No brief for respondent.

BLACK, J.—The demurrer, which was sustained, assigns many reasons why the petition should be held insufficient. Clearly there is nothing in most of them. The cause, thus far, it would seem, has been made to turn upon the third assignment, which is, that a court of equity has no jurisdiction to interfere with or control the judgment and discretion of municipal bodies. The city of Springfield, by ordinance, gave to appellant the right to construct, maintain, and operate a street railroad on certain designated streets and the public square for twenty years. Pursuant to this authority the appellant constructed and put in operation the road at considerable cost. The city threatened, and was about to fence up, with an iron fence, a part of the square, including the part on which the road was located; and, it is alleged, thereby disconnect a part of the road, cut it off from the main line, destroy its usefulness and injure the main line as well.

The ordinance, when accepted, and certainly when acted upon, takes on many of the elements of a contract. It is not within the power of the city to abrogate the contract at pleasure, nor to destroy the rights thus given and acquired. It can no more do this than can an individual. 1 Potter on Corp., sec. 376. The discretionary powers delegated to the city council will not be interfered with by the courts. The council may exercise its judgment and discretion, and in doing so pass such ordinances as may seem best, but of the validity of these

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ordinances when passed, the courts will judge. It becomes their duty to do so. Here we have to deal with a contract between the appellant on the one hand and the city on the other. Some reason must be assigned to justify a resort to a court of equity in case of a threatened breach of contract, or the disregard of a contract duty or the invasion of rights acquired thereunder. That the appellant will be damaged by the disconnection of portions of its road is clearly enough alleged. It is very clear that the damages are such as cannot be fully compensated by any action at law. They are scarcely capable of any fair estimation. This is sufficient to give the court jurisdiction. Equity will interfere to protect and secure the enjoyment of a franchise secured by statute, because it affords the only plain and adequate remedy. *Boston Water Power Co. v. Boston & Worcester Ry. Co.*, 16 Pick. 525; *Newburg Turnpike Co. v. Miller*, 5 John. Ch. R. 101; *The St. Louis Ry. Co. v. N. W. St. Louis Ry.*, 69 Mo. 66. And so equity will protect rights of a like character acquired under municipal ordinances. *The City of Quincy v. Bull et al.*, 106 Ill. 337; *Dillon Mun. Corp.* (2 Ed.) sec. 728, note 1.

The court had jurisdiction to hear and determine the matter presented by the petition, and we think the petition states sufficient facts to call for an answer. It will not be understood from what has been said that the city council, by granting the right to appellant to construct the road, yielded up its power and authority over the street or public square. The appellant is still subject to the reasonable regulations that may be prescribed by the city council, both in the conduct of its business and location of its track at and over the streets and places mentioned in the ordinance. To the end that the demurrer may be overruled and the cause proceeded with, the judgment is reversed and the cause remanded. All concur.

BURGESS V. McLEAN *et al.*, Appellants.

Conveyance: FRAUD: EVIDENCE. The allegations of the petition in this case to the effect that the conveyance by defendant to his wife was in fraud of creditors, *held*, unsupported by the evidence.

Appeal from Cape Girardeau Circuit Court.—HON. J. D. FOSTER, Judge.

REVERSED.

Oliver & Limbaugh and R. L. Wilson for appellants.

Lewis Brown for respondent.

PER CURIAM.—The allegation of the petition to the effect that the conveyance by John McLean to Johnson, and by the latter to McLean's wife, were made with the intent to defraud creditors is wholly without evidence to sustain it. The evidence clearly proves that at the date of those conveyances, John McLean owned unincumbered property of the value of from \$12,000 to \$15,000. That he owed not exceeding five hundred dollars, and that plaintiff's debt was contracted more than two years after the conveyances above named were executed and recorded. The property conveyed was an inconsiderable portion of that owned by McLean, and was a reasonable provision for his wife, to whom he had but recently been married. It was in evidence that he said that the conveyance was made to avoid any debt he might subsequently contract. We suppose that no conveyance was ever made by a husband to his wife but with that view. There is no allegation or evidence to the effect that he

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contemplated contracting debts when the conveyance was made, and that it was made in order to defeat any debts he then had it in contemplation to contract.

The judgment is reversed and the bill dismissed.

FOX V. THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellant.

Railroads: ACTION BY WIFE FOR DEATH OF HUSBAND: CONTRIBUTORY NEGLIGENCE. In an action by plaintiff against a railroad company for the killing of her husband at one of its crossings, by the alleged negligence of the company, a recovery cannot be had where the evidence shows that the deceased was not seen by the engineer in time to stop the train before reaching the crossing, but that the danger signal was given when the deceased was within a few feet of the crossing, which signal he disregarded, and went onto the crossing, and was killed. And it makes no difference in such case that the train was running at a greater rate of speed than that fixed by an ordinance of the city in which the accident occurred.

Appeal from Cole Circuit Court.—HON. E. L. EDWARDS,
Judge.

REVERSED.

Smith & Krauthoff for appellant.

Silver & Brown for respondent.

PER CURIAM.—This suit was brought by plaintiff to recover damages for the killing of her husband by the alleged negligence of defendant in operating its train. She recovered judgment in the circuit court, from which

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the defendant has appealed, and assigns as the principal ground of error, the action of the court in refusing to instruct the jury that, under the evidence, the plaintiff could not recover. The evidence shows that the deceased was killed within the limits of Jefferson City, on a street crossing leading to the ferry across the Missouri river; that the train was being run at a greater rate of speed than that fixed by an ordinance of the said city; that the train could be seen by any one approaching the crossing for a distance of about six hundred feet; that when the deceased was seen by the engineer, at a distance of from one hundred and sixty to two hundred feet, approaching the crossing, and within a few feet of it, the danger signal was given, which deceased disregarded, went on the crossing in front of the engine, was struck and killed by it, which the evidence showed beyond question could not be checked in time to have prevented the accident, after the discovery of the danger to which deceased recklessly exposed himself, with full knowledge of the approach of the train, and rapid speed at which it was running. Under this state of facts the court erred in refusing to give the instruction asked, and for this error the judgment is hereby reversed.

Motion for re-hearing overruled.

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ABANDONMENT.

See HOMESTEADS AND EXEMPTIONS.

ABATEMENT.

1. **GRAND JUROR, DISCHARGE OF: PLEA IN ABATEMENT.** It is competent for the court to discharge a grand juror who had qualified, but failed to attend, and order a new grand juror to be summoned and substituted for him. R. S., sec. 2787. Such action constitutes no ground for a plea in abatement. *The State v. Wilson*, 134.
2. **PLEADING: WAIVER.** A plea in abatement is waived by one to the merits. *Moody v. Deutsch*, 237.

ACCESSORY.

CRIMINAL LAW: FELONY: ACCESSORY AFTER THE FACT. One who conceals or aids a felon, not in order that he may escape arrest, trial, conviction, or punishment, but for some other purpose, cannot be convicted as an accessory after the fact under Revised Statutes, section 1650. *The State v. Reed*, 194.

See PRINCIPAL AND ACCESSORY.

ACCOUNT.

FRAUD: ACTION UPON ACCOUNT: AGENCY: PARTNERSHIP: EVIDENCE. In an action upon an account for merchandise sold, where it is sought to connect the defendant with the purchaser of the goods by showing by circumstantial evidence that the latter acted as defendant's partner and general agent and clerk, and that he ordered other goods and signed defendant's name to notes, and managed mills and threshing machines for defendant, it is error to admit in evidence, to show that defendant bought the goods or ordered them to be bought for him, notes given by defendant to other parties, and notes made by other parties to strangers, and an interplea by defendant, claiming a threshing machine and its earnings, in a suit between the purchaser of the goods and a third party. *Field v. Stubblefield*, 199.

ADMISSIONS.

1. **PRACTICE: ADMISSIONS: NON-SUIT.** Where the answer admits the deed under which defendant claims, which deed contains an assumption of the payment of certain notes in suit, this is sufficient to make out a *prima facie* case for plaintiff, and should prevent the latter's being forced to a non-suit. *Fitzgerald v. Barker*, 13.

2. ———: EVIDENCE: ADMISSION. Where in a suit upon notes certain notes are offered in evidence without objection, this amounts to a tacit admission that they are the notes in suit. *Ib.*

AGENCY.

See ACCOUNT, 1.

AGENT.

See EXPRESS COMPANY.

AMENDMENT.

1. PLEADING: AMENDMENT: JUSTICE OF PEACE. An amended statement cannot be filed in the circuit court on appeal from a justice's court when no statement was filed in the latter court. *Peddicord v. The Mo. Pac. Ry. Co.*, 160.
2. SHERIFF'S DEED, AMENDMENT OF. Where a sheriff's deed is defective, as in failing to state the date and amount of judgment, he has the right to make another deed, and can do so after the expiration of his term of office. *Bush v. White*, 339.
3. PRACTICE: AMENDMENT: STRIKING OUT NAME OF CO-PLAINTIFF. An amendment by striking out the name of a co-plaintiff does not change the original cause of action, and is permissible under Revised Statutes, section 3060. *Davis v. Ritchie*, 501.

APPEALS.

1. JUSTICE'S COURT: JUDGMENT BY DEFAULT: MOTION TO SET ASIDE: APPEAL BOND: SURETIES, JUDGMENT AGAINST. Where an appeal is taken from a judgment by default before a justice, without the party aggrieved having, within ten days from the rendition of the judgment, moved to set the same aside, it is properly dismissed, on motion, in the circuit court. R. S., sec. 3040. The justice, in such case, having no power to grant the appeal, the appeal bond is void, so far as the sureties are concerned, and the circuit court cannot enter judgment against them, but can only dismiss the appeal and enter judgment for costs against the appellant. *Brown v. The Missouri Pacific Ry. Co.*, 123.
2. PLEADING: AMENDMENT: JUSTICE OF PEACE. An amended statement cannot be filed in the circuit court on appeal from a justice's court when no statement was filed in the latter court. *Peddicord v. The Mo. Pac. Ry. Co.*, 160.
3. CONDEMNATION PROCEEDINGS: PRACTICE: EXCEPTIONS: TAKING POSSESSION OF LAND: PAYMENT OF MONEY INTO COURT: STRIKING OUT EXCEPTIONS: ORDERING MONEY PAID TO OWNER: APPEAL: SUPERSEDEAS: PARTY AGGRIEVED: DISMISSAL OF APPEAL. A railroad company has a right, under the statute, to condemn land, and when the report of the commissioner comes in, and the damages assessed

are deemed excessive, to pay the amount assessed to the clerk, to take possession of the land desired in order to construct its road, to file exceptions, to have them heard, and pending the hearing of exceptions to have the money retained by the clerk; and if the court should strike out the exceptions, and order the assessment money paid to the land owner, such order will be a final one, from which the company can appeal with *supersedeas*, as an incident, just as in other civil causes, and the company, in such circumstances, is to be deemed "aggrieved" within the meaning of section 3710, Revised Statutes. *The St. Louis & San Francisco Ry. Co. v. Evans & Howard Fire Brick Co.*, 307.

4. **MANDAMUS: APPEAL.** Mandamus will not lie to relieve against the acts of an inferior court, where the party complaining has a remedy by appeal or writ of error. *The State ex rel. The Evans & Howard Fire Brick Company v. Lubke*, 338.
5. **APPEALS FROM JUSTICES, WHEN TRIABLE: PRACTICE.** Where on an appeal to the circuit court from a justice of the peace the appellant fails to give notice of the appeal and the appellee enters his appearance on or before the second day of the term, the latter is not then entitled to a simple affirmance of the judgment. If he desires a determination of the cause at that term, he must offer evidence and try the case *de novo*. *Priest v. The Missouri Pacific Railway Company*, 521.

APPEAL BOND.

See **APPEALS**, 1.

ASSESSOR.

See **OFFICES AND OFFICERS**, 5.

ASSIGNMENT.

1. **ASSIGNMENT FOR BENEFIT OF CREDITORS: STATEMENT OF PROPERTY: STATUTE.** A deed of assignment under the statute for the benefit of creditors is not invalid because no statement of the property assigned as required by Revised Statutes, section 362, is filed at the same time with the deed. *Hartzler v. Tootle*, 23.
2. **DEED OF ASSIGNMENT: PARTNERSHIP PROPERTY.** The deed of assignment in this case held not invalid for the alleged reason that partnership property was assigned for the benefit of all the creditors, and not for the benefit of firm creditors. *Ib.*
3. — : **RESERVATION OF PROPERTY EXEMPT BY LAW.** A deed of assignment is not void as a matter of law because it contains a general reservation in the assignor of the property exempt by law from seizure for his debts. *Ib.*
4. **JUDGMENT, ASSIGNEE OF: NOTE.** The assignee of a judgment of allowance in the probate court rendered on a note has the better title

and hence the legal right to enforce payment as against one to whom the note was transferred after the rendition of the judgment. *Julian v. Calkins*, 202.

See JUDGMENTS, 9.

ATTACHMENT.

1. **PLEADING : MALICIOUS ATTACHMENT.** A petition in an action for suing out a malicious attachment must allege the want of probable cause for the attachment. *Moody v. Deutsch*, 237.
2. ——— : ——— : **PROBABLE CAUSE.** What is probable cause for an attachment is a mixed question of law and fact. When the facts are undisputed, the court should declare their legal effect, but when they are disputed, the question is, under proper instructions, for the jury. *Ib.*
3. **MALICIOUS PROSECUTION, ACTION FOR : MALICE.** Malice is a necessary element in an action for malicious prosecution, and the sufficiency of the proof of such malice is a question for the jury. *Ib.*

ATTORNEY.

ATTORNEY, AUTHORITY OF. An attorney having in charge certain notes for collection and settlement cannot, without his client's consent, include in the settlement other notes not in his hands. *Melcher v. The Exchange Bank of Jefferson City*, 362.

BACK TAXES.

See TAXES.

BANK.

1. **BANK : CHECK.** A drawer of a check on a bank can countermand its payment before the same is made, he being liable for the consequences of his act in doing so. *Albers v. The Commercial Bank*, 173.
2. ——— : ———. Such drawer cannot recall the check after it has been paid to a holder in good faith and for value, nor can the bank do so for him. *Ib.*
3. **CHECK : NOTICE NOT TO PAY : BURDEN OF PROOF.** When timely notice not to pay a check is given by the drawer to the bank, the burden of proof that payment had already been made is on the bank. *Ib.*
4. **CHECK : PAYMENT OF.** Where a bank receives a check, pays the money or its equivalent to the holder, cancels and charges up the check to the maker, such acts must be regarded as a payment of

the check, and such payment cannot be rescinded without the consent of the person to whom payment of the check was made. *Ib.*

5. **BANK : CHECK.** The liability of a bank to pay a check does not become fixed upon its mere presentment. *Ib.*
6. ——— : ———. In an action against a bank by the drawer of a check for the conversion of the sum for which it was drawn, the bank can show its proper payment to the holder without specially pleading such payment. The check being rightfully paid there could be no conversion. *Ib.*

BILL OF EXCEPTIONS.

1. **PRACTICE : BILL OF EXCEPTIONS : FILING OF.** Leave given to present a bill of exceptions to the judge on or before a given date in vacation, which by agreement of parties is entered of record, clearly gives the right to file the bill within the given time. *Swank v. Swank*, 198.
2. **DOCUMENTARY EVIDENCE : BILL OF EXCEPTIONS.** Where error is complained of in the admission in evidence of written documents, such documents, or so much thereof as relate to the point of objection, should be preserved in the bill of exceptions. *Bettes v. Magoon*, 580.

BILLS AND NOTES.

1. **NOTE, WHEN NEGOTIABLE : POSSESSION : HOLDER.** Notes made payable to the order of the payee, and indorsed by him, are negotiable, and one who brings suit upon them, having them in possession, is *prima facie*, the holder and owner of them. *Fitzgerald v. Barker*, 13.
2. ——— : **INDORSEMENT.** Whenever a bill or note is payable to a certain person, or order, it is the same as if expressed to be payable to the order of that person, and is payable to whomsoever the payee named may, by indorsement, order it to be paid. *Ib.*
3. ——— : **POSSESSION : RIGHT OF ACTION.** A note payable to the order of a certain person, when indorsed by him, becomes at once negotiable, and passes from hand to hand, like notes made payable to bearer ; it is transferable by delivery, and possession proves property in it, and the right and capacity of the possessor to sue. *Ib.*
4. **PRACTICE : ADMISSIONS : NON-SUIT.** Where the answer admits the deed under which defendant claims, which deed contains an assumption of the payment of certain notes in suit, this is sufficient to make out a *prima facie* case for plaintiff, and should prevent the latter's being forced to a non-suit. *Ib.*
5. ——— : **EVIDENCE : ADMISSION.** Where, in a suit upon notes, certain notes are offered in evidence without objection, this amounts to a tacit admission that they are the notes in suit. *Ib.*

6. **ASSUMPTION OF DEBT BY RECITAL IN DEED: LIABILITY.** Where a purchaser accepts and holds, under a conveyance containing a clause which recites that he has assumed and agrees to pay a note secured by a subsisting mortgage on the land, he thereby subjects himself to a liability which the holder of the note may enforce by a personal action. *Fitzgerald v. Barker*, 70 Mo. 685. And this assumption extends not only to the holder at the time of such assumption, but to any subsequent holder; it is as broad and unrestricted as the negotiability of the note agreed to be paid. *Ib.*
7. **RECITAL IN DEED: ESTOPPEL.** Where the deed under which a defendant claims, contains recitals of the assumption of the payment of certain notes by him, he can no more deny such recitals than he can any other recital contained in the deed. *Ib.*
8. **ASSUMPTION OF ANOTHER'S DEBT: ESTOPPEL.** Where one, for a valuable consideration, assumes the payment of certain notes, he will be estopped from denying their existence at the time he assumed their payment. *Ib.*
9. **ORDINARY COURSE OF BUSINESS: PRESUMPTION.** Where a deed of trust made to secure the payment of certain notes, was executed prior to the execution of a deed to defendant, in which is assumed the payment of the notes, it will be presumed that the ordinary course of business was pursued, and that the notes had been executed and delivered when defendant assumed their payment. *Ib.*
10. **EXECUTORY CONTRACT: PROMISE TO PAY NOTE WHEN EXECUTED.** If, upon a valuable consideration, a specific promise be made to pay certain notes whenever they shall be executed, the contract will be good as an executory agreement, and the valid promise will attach to the notes immediately upon their execution. *Ib.*
11. **NOTE PAST DUE: TITLE.** The transferee of a note past due takes only the title of his transferrer. *Julian v. Calkins*, 202.
12. **JUDGMENT, ASSIGNEE OF: NOTE.** The assignee of a judgment of allowance in the probate court rendered on a note has the better title, and, hence, the legal right to enforce payment as against one to whom the note was transferred after the rendition of the judgment. *Ib.*
13. **NOTE: PRESENTMENT FOR PAYMENT.** Where a note is payable at no particular place and is presented for payment to the maker in person, the place of the presentation is immaterial. *Townsend v. The Chas. H. Heer Dry Goods Company*, 503.
14. ———: ———: **INDORSER.** Where a note is payable at a particular place, it must be presented there to render an indorser liable. *Ib.*
15. ———: **NOTICE OF DISHONOR.** A variance which is not misleading, between the notice of dishonor and the note, will not affect the sufficiency of the notice. *Ib.*
16. **NEGOTIABLE NOTE, ACTION ON: PLEADING.** A petition in an action against an indorser on a negotiable promissory note must state facts

from which it may appear to the court that the note was a negotiable one. *Ib.*

BOND.

1. **EXPRESS COMPANY : AGENT : BOND.** Where an express company seeks to recover on the bond of its agent for its breach in receiving a package to be forwarded to its destination and which was not forwarded or accounted for, it must show that the defendant received the package as its agent. *The Southern Express Co. v. Moeller*, 208.
2. **SHERIEF, OFFICIAL ACTS OF : BOND.** A sheriff, who by consent of the parties in interest, receives payment of the purchase money of land sold under a judgment in partition, before the time the same is due and payable under the order of sale, will be deemed to have received it in his official capacity, and the sureties on his bond are liable for his default in paying it over to the persons entitled to it. *The State ex rel. Rice v. Cayce*, 456.

BURDEN OF PROOF.

— : **PRACTICE : BURDEN OF PROOF.** When in a prosecution for libel, the publication of the libelous matter is proved by the state, the burden is then on the defendant to justify the publication. *The State v. Hosmer*, 553.

See BANK, 3.

NEGLIGENCE, 13.

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CHECK.

1. **BANK : CHECK.** A drawer of a check on a bank can countermand its payment before the same is made, he being liable for the consequences of his act in doing so. *Albers v. The Commercial Bank*, 173.
2. — : —. Such drawer cannot recall the check after it has been paid to a holder in good faith and for value, nor can the bank do so for him. *Ib.*
3. **CHECK : NOTICE NOT TO PAY : BURDEN OF PROOF.** When timely notice not to pay a check is given by the drawer to the bank, the burden of proof that payment had already been made is on the bank. *Ib.*
4. **CHECK : PAYMENT OF.** Where a bank receives a check, pays the money or its equivalent to the holder, cancels and charges up the

check to the maker, such acts must be regarded as a payment of the check, and such payment cannot be rescinded without the consent of the person to whom payment of the check was made. *Ib.*

5. **BANK: CHECK.** The liability of a bank to pay a check does not become fixed upon its mere presentment. *Ib.*
6. ———: ———. In an action against a bank by the drawer of a check for the conversion of the sum for which it was drawn, the bank can show its proper payment to the holder without specially pleading such payment. The check being rightfully paid there could be no conversion. *Ib.*

CLOUD UPON TITLE.

See INJUNCTION.

COMMON CARRIERS.

See RAILROADS, 4.

CONDEMNATION PROCEEDINGS.

1. **CONDEMNATION PROCEEDINGS: PRACTICE: EXCEPTIONS: TAKING POSSESSION OF LAND: PAYMENT OF MONEY INTO COURT: STRIKING OUT EXCEPTIONS: ORDERING MONEY PAID TO OWNER: APPEAL: SUPERSEDEAS: PARTY AGGRIEVED: DISMISSAL OF APPEAL.** A railroad company has a right, under the statute, to condemn land, and when the report of the commissioners comes in, and the damages assessed are deemed excessive, to pay the amount assessed to the clerk, to take possession of the land desired in order to construct its road to file exceptions, to have them heard, and pending the hearing of exceptions to have the money retained by the clerk; and if the court should strike out the exceptions, and order the assessment money paid to the land owner, such order will be a final one, from which the company can appeal with *supersedeas*, as an incident, just as in other civil causes, and the company, in such circumstances, is to be deemed "aggrieved" within the meaning of section 3710, Revised Statutes. *The St. Louis & San Francisco Railway Company v. Evans & Howard Fire Brick Company*, 307.
2. **CONSTITUTIONS, HOW TO BE CONSTRUED.** Constitutions are instruments of a practical nature, to be construed, with the help of common sense, so as to carry out the intention of the framers and adopters of the instrument, and it must be assumed as a basis for the construction of the constitution that an intelligent purpose prompted those who were connected with its making or adoption, and that those thus engaged were familiar with all the vicissitudes of condemnation proceedings, and the statutes and decisions relating thereto, and purposely framed section 21, of article 2, of the constitution, so as to meet the exigencies of filing exceptions, taking possession of land, payment of money into court, appeals, *supersedeas*, etc. *Ib.*
3. **STATUTES: CONSTRUCTION OF: PRESUMED TO BE CONSTITUTIONAL.**

There is no necessary repugnancy between the statute of 1879, relating to condemnation of land, and section 21, article 2, of the constitution. *Ib.*

4. CONSTRUCTION OF SECTION 21, ARTICLE 2, OF CONSTITUTION. Section 21, article 2, of the constitution, is complied with, both in letter and the ordinary import of its terms, when the money is "paid into court," notwithstanding that exceptions are filed and possession taken of the land. That section of the constitution only guarantees to the land owner "just compensation," and no more, and was never intended to countenance arbitrary assessments and exorbitant exactions. *Ib.*
5. COMPENSATION, MANNER OF ASCERTAINING. The constitution has left entirely to the legislature the manner whereby the jury or commissioners are to ascertain the *quantum* of compensation, and that manner or method may well include all necessary details of motions, exceptions, the appointment of new commissioners, or another jury, "as right and justice may require." All means necessary to the end to be accomplished, not inconsistent with the constitution, belong in this regard to the legislature. *Ib.*
6. NO ESTOPPEL IN CONSEQUENCE OF COMPLYING WITH UNCONSTITUTIONAL STATUTE. Where a railroad corporation, relying on the presumption that a statute is constitutional, pays money into court, files exceptions, and takes possession of land, such acts are to be taken as a whole and not by *piecemeal*, not valid in part and void in part, and if the statute turns out to be unconstitutional, no estoppel will arise against such corporation in consequence of complying with the statutory terms. *Ib.*
7. RAILROADS: CONDEMNATION OF LAND. Proceedings to condemn land for railroad purposes must be brought in the county where the land lies. *The Missouri Pacific Ry. Co. v. Carter*, 448.
8. ———: ———: PARTIES. One who is neither a resident of the county, nor of the judicial circuit, cannot be joined in the proceeding. Such misjoinder, however, could only cause a dismissal as to him, and would not authorize the court to dismiss the whole proceeding. *Ib.*
9. ———: ———: MINORS. The land of minors cannot be condemned for railroad purposes without making their guardians defendant in the condemnation proceeding. In case they have no regular guardian, guardians *ad litem* should be appointed. *Ib.*
10. ———: COMMISSIONERS' REPORT. The report of the commissioners is insufficient if it fail to contain a specific description of the property for which damages are assessed. *Ib.*
11. TAKING OF PRIVATE PROPERTY FOR PUBLIC USE: COMPENSATION. The judgment of the circuit court, that where commissioners appointed to ascertain the compensation of land taken for a public road, find that the advantages to the owner of the land equal the disadvantages, they should assess no damages, affirmed. *Jackson County v. Waldo*, 637.

Henry, C. J., Dissenting.

12. **CONSTITUTIONAL LAW : TAKING OF PRIVATE PROPERTY FOR PUBLIC USE : COMPENSATION : PUBLIC ROAD.** Private property shall not be taken or damaged for public use without just compensation (Constitution, 1875, article 2, section 21), and until such compensation is ascertained and paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner therein, divested. The finding of commissioners that the benefits derived from the location of a public road upon land will equal the value of the land taken, is not an ascertainment of a compensation which can be paid to the owner, or into court for the owner, and the owner cannot be deprived of his land until paid its cash value in money. *Ib.*

CONFESSIONS.

1. **CRIMINAL LAW : EVIDENCE : CONFESSION.** A confession procured by artifice is not for that reason inadmissible, unless the artifice used was calculated to produce an untrue confession. *The State v. Fredericks*, 145.
2. — : — : —. Mere suggestions or advice to the accused to confess, or even solemn adjurations to do so by one holding no official position, will not render the confession inadmissible. But in all cases the age, experience and constitution of the person making the confession and the circumstances under which it was made should be taken into consideration in determining the question of its admissibility. *Ib.*

CONSIDERATION.

See **CONTRACTS**, 3.

CONSPIRACY.

- : — : — : **DECLARATIONS OF CONSPIRATOR.** After the accomplishment or abandonment of the common enterprise, no declaration of one conspirator will affect another and should be excluded as to the latter. *The State v. Fredericks*, 145.

CONSTITUTIONAL LAW.

1. **TOWNSHIP RAILROAD AID ACT : CONSTITUTION.** The fifth section of the act of 1868, to facilitate the construction of railroads (Laws 1868, p. 93), being unconstitutional and void (*Webb v. Lafayette County*, 67 Mo. 353), could furnish no valid authority to a township which had subscribed to a railroad to retain the taxes collected from such railroad, and they were properly paid into the state treasury, and, being so paid, the general assembly could not refund them to the township. *The State ex rel. Prairie Township v. Walker*, 41.
2. **CONSTITUTION : STATUTE.** The act of the general assembly of

March 19, 1881 (Laws of 1881, p. 189), providing for the refunding of said taxes to the townships by the state, *held*, unconstitutional. *Ib.*

3. CONSTITUTION: STATUTES. An act of the legislature must appear to be unconstitutional beyond a reasonable doubt before the judiciary will pronounce it invalid for that reason. *Ewing v. Hoblitzelle*, 64.
4. STATUTE: SINGLE SUBJECT. TITLE: CONSTITUTION. When all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or the means of accomplishing it, then the subject is single within the meaning of the constitution, that no bill except the general appropriation bill, shall contain more than one subject, and if the latter is sufficiently expressed in the title, the statute is valid. *Ib.*
5. ———: ———: ———: ———. The act of the legislature of March 31, 1883 (Laws, p. 38), which provides, and so expresses in its title, "for the registration of all voters in cities having a population of more than one hundred thousand inhabitants, and to govern elections in such cities and to create the office of recorder of voters," is not obnoxious to the inhibition of the constitution, that no bill shall contain more than one subject which shall be clearly expressed in the title. *Ib.*
6. CONSTITUTION: SPECIAL LAW. Such act is not unconstitutional as being a special law, because, first, section 5, article 8, of the constitution, not only confers on the legislature the power to pass such a law, but expressly commands the exercise of the power, and, second, because the act is not restricted or limited in its operation only to cities having a population of over one hundred thousand at the time it was passed. *Ib.*
7. ———: ———. A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class, is a special one. *Ib.*
8. CHARTER OF ST. LOUIS: CONSTITUTION. Said act of March 31, 1883, is not invalid as being in conflict with the provisions of the constitution authorizing the voters of the city of St. Louis to frame and adopt a charter for its government, such charter and amendments thereto being by express provision of the constitution subordinate to the constitution and laws of the state. *Ib.*
9. CONSTITUTIONS, HOW TO BE CONSTRUED. Constitutions are instruments of a practical nature, to be construed, with the help of common sense, so as to carry out the intention of the framers and adopters of the instrument, and it must be assumed as a basis for the construction of the constitution that an intelligent purpose prompted those who were connected with its making or adoption, and that those thus engaged were familiar with all the vicissitudes of condemnation proceedings, and the statutes and decisions relating thereto, and purposely framed section 21, of article 2, of the constitution, so as to meet the exigencies of filing exceptions, taking possession of land, payment of money into court, appeals, *supersedeas*, etc. *The St. Louis & San Francisco Railway Company v. Evans & Howard Fire Brick Company*, 307.

10. STATUTES : CONSTRUCTION OF : PRESUMED TO BE CONSTITUTIONAL. There is no necessary repugnancy between the statute of 1879, relating to condemnation of land, and section 21, article 2, of the constitution. *Ib.*
11. STATUTE, REVISION OF, AFTER ADOPTION OF CONSTITUTION : PRESUMPTION ARISING THEREFROM : LEGISLATIVE CONSTRUCTION OF : CONFORMITY OF STATUTE TO CONSTITUTION : WEIGHT OF. Where, as in this instance, the legislature has revised a statute after a constitution has been adopted, such a revision is to be regarded, *pro hac vice*, as a new enactment, and as a legislative construction that the statute so revised, conforms to the constitution; and the courts should give some weight to, and rely with some degree of confidence on such legislative construction. *Ib.*
12. CONSTRUCTION OF SECTION 21, ARTICLE 2, OF CONSTITUTION. Section 21, article 2, of the constitution, is complied with, both in letter and the ordinary import of its terms, when the money is "paid into court," notwithstanding that exceptions are filed and possession taken of the land. That section of the constitution only guarantees to the land owner "just compensation" and no more, and was never intended to countenance arbitrary assessments and exorbitant exactions. *Ib.*
13. COMPENSATION, MANNER OF ASCERTAINING. The constitution has left entirely to the legislature the manner whereby the jury or commissioners are to ascertain the *quantum* of compensation, and that manner or method may well include all necessary details of motions, exceptions, the appointment of new commissioners, or another jury, "as right and justice may require." All means necessary to the end to be accomplished, not inconsistent with the constitution belong in this regard to the legislature. *Ib.*
14. NO ESTOPPEL IN CONSEQUENCE OF COMPLYING WITH UNCONSTITUTIONAL STATUTE. Where a railroad corporation, relying on the presumption that a statute is constitutional, pays money into court, files exceptions, and takes possession of land, such acts are to be taken as a *whole* and not by *piecemeal*, not valid in part and void in part, and if the statute turns out to be unconstitutional, no estoppel will arise against such corporation in consequence of complying with the statutory terms. *Ib.*
15. CONSTITUTION : ST. LOUIS COURT OF APPEALS : TRANSFER OF CAUSES TO SUPREME COURT. The general assembly was authorized, by virtue of the amendment to the constitution of 1884, concerning the judicial department, to transfer to the Supreme Court from the St. Louis court of appeals all causes pending in the latter court on January 1, 1885, and which were subject to final review in the Supreme Court. *In re Garesche*, 469.
16. CONSTITUTION. The provisions of section 1635, Revised Statutes, are not in conflict with the constitution of the state nor of the United States. *The State v. Blount*, 543.
17. CONSTITUTION : RAILROAD TAX : STATUTE. Section 32, page 427, Revised Statutes, 1855 (R. S., 1865, chap. 63, sec. 19), which provided

that: "If any of the taxpayers in any county or city in which a railroad tax shall be levied, shall have subscribed in good faith to the capital stock of any railroad to which the county shall have subscribed, the said taxpayers shall be entitled to a deduction on the amount assessed against them respectively, in proportion to the amounts of their *bona fide* subscriptions, until the amount of such credits or deductions shall equal the amount of their subscriptions, after which they shall be subject to pay their railroad tax as other persons," was repugnant to the provisions of the constitution of 1865, and hence invalid under that instrument. *Cock v. Stewart*, 575.

18. CONSTITUTIONAL LAW: TAKING OF PRIVATE PROPERTY FOR PUBLIC USE: COMPENSATION: PUBLIC ROAD. Private property shall not be taken or damaged for public use without just compensation (Constitution, 1875, article 2, section 21), and until such compensation is ascertained and paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner therein divested. The finding of commissioners that the benefits derived from the location of a public road upon land will equal the value of the land taken, is not an ascertainment of a compensation which can be paid to the owner, or into court for the owner, and the owner cannot be deprived of his land until paid its cash value in money. *Per Henry, C. J. Jackson County v. Waldo*, 637.

CONSTRUCTION.

OF STATUTES. *The St. Louis & San Francisco Ry. Co. v. Evans & Fire Brick Co.*, 307.

OF CONSTITUTIONS. *Ib.*

CONTINUANCE.

- 1 PRACTICE, CRIMINAL: CONTINUANCE. An application for continuance under Revised Statutes, section 1834, which states the facts defendant expects to prove by the absent witnesses, but fails to state that he is unable to prove them by any other witness whose testimony could be as easily procured, is fatally defective and should be denied. *The State v. Lett*, 52.
2. PRACTICE, CRIMINAL: CONTINUANCE. It is not error to deny an application for continuance where it shows the exercise of no diligence on the part of defendant in preparing for trial. *The State v. Wilson*, 134.
3. ———: ———. An application for continuance, based upon the ground of the absence of material witnesses, which fails to comply with the requirements of the statute (R. S., sec. 1834), by setting forth the probability of procuring the testimony of such witnesses and the time within which it may be done, is defective and properly denied. *Ib.*
4. ———: ———: DISCRETION OF COURT. Granting and refusing applications for continuance are matters always resting largely in the discretion of the trial court, and unless it clearly appears that such

discretion has been unsoundly exercised the Supreme Court will not interfere. *Ib.*

CONTRACTS.

1. **EXECUTORY CONTRACTS: PROMISE TO PAY NOTE WHEN EXECUTED.** *If*, upon a valuable consideration, a specific promise be made to pay certain notes whenever they shall be executed, the contract will be good as an executory agreement, and the valid promise will attach to the notes immediately upon their execution. *Fitzgerald v. Barker*, 13.
2. **RAILROADS: TRANSPORTATION: OVERCHARGES: CONTRACT.** In an action against a railroad company to recover the penalties for overcharges for transportation, where there was a special contract between the shipper and the company for legal rates, the plaintiff is not remitted to an action for breach of the contract, and such contract constitutes no defence. *Reynolds v. The Chicago & Alton Ry. Co.*, 90.
3. **CONTRACT: SPECIFIC PERFORMANCE OF: CONSIDERATION.** Plaintiff was indebted to defendant in the sum of \$1,900, and after agreeing upon the price of cattle some time before that sold and delivered by plaintiff to defendant, and crediting it on the debt, defendant said if plaintiff would pay him what was due him, he, defendant, would make plaintiff a quit-claim deed for the land involved in suit. *Held*, there was no consideration for the promise to make the conveyance and a suit to enforce it could not be maintained. *Tucker v. Bartle*, 114.
4. **STATUTE OF FRAUDS.** The statute of frauds does not make an agreement in writing obligatory, because it is in writing. If not binding as a verbal agreement before the statute because of want of consideration, reducing it to writing imparts to it no validity. The statute simply declares that no action shall be brought upon certain contracts unless reduced to writing. *Ib.*
5. **———: ORDINANCE: REPAIRING STREET: CONTRACT.** An ordinance of a city giving the privilege of using its street for a horse railway and which contained a provision requiring the railway company to keep and maintain the space between its rails and for two feet on either side of its track, and all street crossings along its line in good repair, does not impose on such company an obligation to re-construct the street. *The State ex rel. Kansas City v. The Corrigan Railway Company*, 263.
6. **———. An obligation to repair a street is not an obligation to construct thereon a new pavement.** *Ib.*
7. **———: ———: POLICE POWER.** Nor could the city, by a subsequent ordinance, impose on the railway company, without its consent, such additional obligation to pave the street. Such subsequent ordinance cannot be sustained on the ground that it is a proper exercise of the police power of the city. *Ib.*
8. **NEGLIGENCE: RAILROADS: CONTRACT: PASSENGER.** By the terms of

a written contract entered into between the Missouri Pacific Railway Company and the defendant, the passenger trains of the latter were to be drawn over the road of the former between the town of Pacific, defendant's eastern terminus, and the city of St. Louis; the Missouri Pacific company using its own locomotive and crew of same, and the defendant furnishing at its own expense all train men for the care and management of its trains, the manner of running the latter and the control and acts of said train men being subject to the rules and regulations of the Missouri Pacific company while so running on its track. *Held*, there could be no recovery against defendant for the death of a passenger caused by the failure of the train to stop long enough for the deceased to alight at his destination and while the train was being operated between St. Louis and Pacific, the deceased having purchased his ticket from the Missouri Pacific company, and for transportation between St. Louis and the town of Webster, where the accident occurred. (Black and Norton, JJ., dissenting). *Smith v. The St. Louis & San Francisco Ry. Co.*, 418.

9. ———: ———. Under the contract between the two companies, the train by which the deceased was killed cannot be regarded as defendant's train in such a sense as to make it liable for the accident. *Ib.*
10. **WAGERING CONTRACTS, WHAT ARE.** Where in a contract for the sale of wheat, it is the mutual understanding and intention of the parties that the transaction shall be closed by a settlement of differences in the value of the article sold according to the fluctuations of the market and not by its delivery, such contract is one of wager and is void as being against public policy. *Cockrell v. Thompson*, 510.
11. ———. Where, however, it does not appear that it was the intention of both of the contracting parties to so settle according to the fluctuations of the market, the contract will be upheld. *Ib.*
12. **VENDOR AND VENDEE: CONTRACT, BREACH OF.** Where a quantity of mineral is sold and part delivery made, and the vendee makes a resale to a third person of the residue in the vendor's hands without notifying the latter, it would be a breach of the contract for the vendor to deliver it to such third person. And if the vendee refuses to accept the residue, the vendor may sell it and recover of the vendee the difference between the contract price and that for which the mineral sold. *McClelland v. The Picher Lead & Zinc Co.*, 636.
13. **MUNICIPAL CORPORATIONS: CONTRACTS BY: INVIOABILITY OF.** Where a city, by its ordinance makes a contract, and the same is accepted and acted on by the other party, it cannot abrogate such contract at pleasure, or destroy the rights so given and acquired. *The Springfield Ry. Co. v. The City of Springfield*, 674.
14. **CONTRACT: BREACH OF: EQUITY.** Where the damages arising from a breach of contract are not capable of fair estimation, and are such as cannot be fully compensated by an action at law, equity will interfere to restrain such breach. *Ib.*

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 12, 20, 21.

CONVERSION.

1. ———: CONVERSION. In an action against a bank by the drawer of a check for the conversion of the sum for which it was drawn, the bank can show its proper payment to the holder without specially pleading such payment. The check being rightfully paid there could be no conversion. *Albers v. The Commercial Bank*, 173.
2. THE CONVERSION of certain notes and securities held to be within the issues made by the pleadings in this case, and the judgment for their value in favor of a defendant and against a co-defendant, affirmed, and this although the petition was one in ejectment. *Hicks v. Jackson*, 293.
3. CONVERSION: INADEQUATE DAMAGES: PRACTICE. The court should set aside a verdict for the plaintiff in an action for the conversion of property when the damages assessed by the jury are manifestly inadequate, and where the trial court refuses to do so, the Supreme Court will interfere and reverse the judgment. *Watson v. Harmon*, 443.
4. INTEREST. Interest should be allowed on the value of property wrongfully converted from the time of the conversion. *Ib.*

CONVEYANCE.

See DEEDS, 24.

CORPORATIONS.

CORPORATIONS: MALICIOUS PROSECUTION: FALSE IMPRISONMENT. A corporation is liable to an action for false imprisonment, or for malicious prosecution instituted by its authority. Affirming *Boogher v. Life Association of America*, 75 Mo. 319. *Woodward v. The St. Louis & San Francisco Ry. Co.*, 142.

COUNTY SCHOOL COMMISSIONER.

SCHOOL DISTRICTS: CHANGE OF BOUNDARIES: COUNTY COMMISSIONER. A county school commissioner, when deciding as to the change of boundaries of school districts, referred to him under Revised Statutes, section 7023, cannot change such boundaries otherwise than as proposed in the election held under the statute. He must confine himself to the question whether the change proposed in said election shall, or shall not be made. *The State ex rel. School District No. 6 v. Riley*, 156.

COUNTY WARRANT.

See SPECIAL FUND.

CRIMINAL LAW.

1. **GRAND JUROR, DISCHARGE OF : PLEA IN ABATEMENT.** It is competent for the court to discharge a grand juror who had qualified but failed to attend, and order a new grand juror to be summoned and substituted for him. R. S. sec., 2787. Such action constitutes no grounds for a plea in abatement. *The State v. Wilson*, 134.
2. **CHANGE OF VENUE : DISCRETION OF TRIAL COURT.** Where the court hears evidence for and against an application for a change of venue in a criminal case, based upon the ground of the prejudice of the inhabitants of the county against the defendant, its action upon the application is final, unless it is shown that it abused its discretion. *Ib.*
3. **CRIMINAL LAW : THREATS : RES GESTAE.** While mere threats are not sufficient to palliate a homicide, yet when they occur as a part of the *res gestae*, and are uttered while making an attempt on the life of the person threatened, they may be worthy of consideration, as tending, in connection with such attempt, to lower the grade of homicide when perpetrated by the person threatened. *Ib.*
4. ——— : **RECITALS IN MOTION : JUDICIAL NOTICE.** In a case of conviction of a negro, where the motion for new trial recites that there were no negroes returned on the panel of forty, from which the jury was selected to try the cause, but there is nothing in the record to show whether the panel was white or black, or whether the population of the county consists in part of negroes, such recitals do not constitute evidence of these facts, and the Supreme Court will not take judicial notice of them, and will not review the point. *Ib.*
5. **CRIMINAL LAW : EVIDENCE : CONFESSIONS.** A confession procured by artifice is not for that reason inadmissible, unless the artifice used was calculated to produce an untrue confession. *The State v. Fredericks*, 145.
6. ——— : ——— : ———. Mere suggestions or advice to the accused to confess, or even solemn adjurations to do so by one holding no official position, will not render the confession inadmissible. But in all cases the age, experience and constitution of the person making the confession and the circumstances under which it was made should be taken into consideration in determining the question of its admissibility. *Ib.*
7. ——— : ——— : **DECLARATIONS OF CONSPIRATOR.** After the accomplishment or abandonment of the common enterprise, no declaration of one conspirator will affect another and should be excluded as to the latter. *Ib.*
8. ——— : **WITHDRAWING EVIDENCE BY INSTRUCTION.** Where a specific objection to improper evidence is overruled and it goes to the jury with the sanction of the court, the error will not be cured by withdrawing it by instruction, if it is of such character as to prejudice defendant's case. *Ib.*
9. ——— : **PRINCIPAL AND ACCESSORY : STATUTE.** All distinction be-

tween principal and accessory before the fact has been abolished by Revised Statutes, section 1649. *Ib.*

10. **CRIMINAL LAW : SELF-DEFENCE.** Where, in a trial for homicide, it appears that the defendant commenced the difficulty, or brought it on by a wilful or unlawful act committed by him at the time, or that he voluntarily entered in the difficulty, he cannot claim that the killing was done in self-defence, and in such case it makes no difference how imminent the peril might have been in which the defendant was placed during the difficulty. *The State v. Peak*, 190.
11. **EVIDENCE : DEFENDANT'S STATEMENTS.** Where, on the trial in a criminal case, the state proves statements of the defendant made after the commission of the offence, he is entitled to the benefit of what he said for himself, if true, as is the state to the benefit of what he said against himself. What he said against himself the law presumes to be true, because made against himself. But what he said for himself the jury are not bound to believe, because said in a conversation proved by the state, and may believe it, or disbelieve it, as it may be shown to be true, or false, by the evidence in the case. *Ib.*
12. **CRIMINAL LAW : FELONY : ACCESSORY AFTER THE FACT.** One who conceals or aids a felon, not in order that he may escape arrest, trial, conviction or punishment, but for some other purpose, cannot be convicted as an accessory after the fact under Revised Statutes, section 1650. *The State v. Reed*, 194.
13. — : **EVIDENCE.** On a trial under said statute for being an accessory after the fact in the larceny of a horse by one F., declarations of the latter that defendant participated in the stealing of another horse about the same time, and belonging to another person than the one from whom the first horse was stolen are inadmissible in evidence. *Ib.*
14. **CRIMINAL LAW : FALSE PRETENSES.** The evidence in this case held sufficient to sustain a conviction under Revised Statutes, section 1561, for obtaining money by means of false pretenses. *The State v. Cooper*, 256.
 — : **EVIDENCE.** Transactions, although extending over several days, and occurring at different times, but having in view the common object of the commission of the crime, are admissible in evidence. *Ib.*
16. **FALSE PRETENSES : RECEIVING MONEY BACK.** The fact that the person from whom the money is obtained by false pretenses received it back at the time, or after the arrest of the defendant, cannot affect the prosecution for the offence. *Ib.*
17. **FISH LAW : BAYOU : WATERS OF STATE.** A bayou extending back from Lake Contrary, a public body of water in Buchanan county, and into which from the lake fish have free and uninterrupted access, and not being wholly on premises belonging to the defendant, falls within the description "waters of the state" in Revised

Statutes, section 1625, which forbids the erecting or maintaining of any seine, net or trap, etc., in any waters of the state and the catching of fish therein by any such means. *The State v. Blount*, 543.

18. ——— : STATUTE, CONSTRUCTION OF : WATERS WHOLLY ON PREMISES, ETC. Said section 1625, Revised Statutes, contains a proviso that the prohibitions therein shall not apply to waters wholly on the premises belonging to such person or persons using such device or devices; *held*, that the word "persons" means joint owners, and before any person or persons can claim the protection of the proviso, if a sole owner of the land, he must show, and if a joint owner with others, they must show that the waters are wholly on the premises of such owner or owners. If a stream, it must have its source and its mouth and its whole course on the sole owner's or the joint owners' land; and if a lake or bayou, it must be entirely surrounded by the lands of the sole or joint owners to be wholly on the premises of such owner or owners. *Ib.*
19. MURDER : MANSLAUGHTER : SELF-DEFENCE : INSTRUCTIONS. A series of instructions upon the law of murder, manslaughter, and self-defence, approved. *The State v. Gee*, 647.
20. CRIMINAL LAW : LARCENY OF DEED : INDICTMENT. In an indictment under Revised Statutes, section 1312, for the larceny of a deed, the same particularity of description is not necessary as in charging its forgery. If the statutory term is employed in designating the instrument charged to have been stolen, no more minute description is requisite than the common law requires in an indictment for the larceny of an ordinary chattel. It is sufficient to describe the instrument by any name by which the same may be usually known. *R. S.*, sec. 1814. *The State v. Hall*, 669.
21. ——— : ——— : ———. An indictment for the larceny of a deed need not mention the name of the grantee in the deed. And the term "deed" imports a complete instrument. *Ib.*
22. ——— : ——— : ——— : VALUE : OWNERSHIP. In an indictment under Revised Statutes, section 1312, for the larceny of a deed, it is not necessary to allege that it was of any value. And said section is broad enough to cover the larceny of deeds not delivered, and wills not probated. The indictment in such case may charge the property as either the bailee's or the bailor's, or as the thief's, or true owner's, at the election of him who draws it. *Ib.*
23. ——— : ——— : EVIDENCE : TAKING : INTENT. Where one obtains possession of a deed of release under the pretense that it was only for a temporary purpose, and, after so securing possession of it, has it placed upon record, this is such a trick or artifice as amounts to a constructive taking and is evidence of an original felonious intent. *Ib.*
24. ——— : INTENT. The intent with which one does an act is properly presumed to be that which was its natural consequence, and may be gathered from his subsequent conduct, conversations and letters in relation to such act. *Ib.*

DAMAGES.

RAILROADS: EMBANKMENT: OBSTRUCTION OF SURFACE WATER: DAMAGES.

Where a railroad company condemns land for its right of way by proper methods, and without negligence, unskilfulness, or mismanagement, constructs its road, and the embankment therefor, obstructing no natural channel of water thereby, the injuries done by such embankment, by causing water to flow over the land of adjoining proprietors, will be regarded as the natural incidents and consequences of that which the corporation, by reason of condemning the land, had acquired the lawful right to do. For such injuries no action will lie, damages for them being assumed to be included in those already assessed. *Moss v. The St. L., I. M. & S. Ry. Co.*, 86.

DEEDS.

1. **ASSUMPTION OF DEBT BY RECITAL IN DEED: LIABILITY.** Where a purchaser accepts and holds under a conveyance containing a clause which recites that he has assumed and agrees to pay a note secured by a subsisting mortgage on the land, he thereby subjects himself to a liability which the holder of the note, may enforce by a personal action. *Fitzgerald v. Barker*, 70 Mo. 685. And this assumption extends not only to the holder at the time of such assumption, but to any subsequent holder: it is as broad and unrestricted as the negotiability of the note agreed to be paid. *Fitzgerald v. Barker*, 13.
2. **RECITAL IN DEED: ESTOPPEL.** Where the deed under which a defendant claims, contains recitals of the assumption of the payment of certain notes by him, he can no more deny such recitals than he can any other recital contained in the deed. *Ib.*
3. **ORDINARY COURSE OF BUSINESS: PRESUMPTION.** Where a deed of trust, made to secure the payment of certain notes, was executed prior to the execution of a deed to defendant, in which is assumed the payment of the notes, it will be presumed that the ordinary course of business was pursued, and that the notes had been executed and delivered when defendant assumed their payment. *Ib.*
4. **DEED OF ASSIGNMENT; PARTNERSHIP PROPERTY.** The deed of assignment in this case held not invalid for the alleged reason that partnership property was assigned for the benefit of all the creditors and not for the benefit of firm creditors. *Hartzler v. Tootle*, 23.
5. ———: **RESERVATION OF PROPERTY EXEMPT BY LAW.** A deed of assignment is not void as a matter of law because it contains a general reservation in the assignor of the property exempt by law from seizure for his debts. *Ib.*
6. **DEED; ACKNOWLEDGMENT OF BY WIFE: EVIDENCE: CROSS-EXAMINATION.** Where a married woman testifies that she was not made acquainted with the contents of the deed by the notary taking her acknowledgment to it, it is competent to ask her on cross-examination, whether or not she knew the contents at the time she made

the acknowledgment, and informed the notary, in answer to his inquiry to that effect, that she was acquainted with the contents. *Drew v. Arnold*, 128.

7. ———: CERTIFICATE OF OFFICER. Where it appears to the court, or officer taking the acknowledgment of a married woman to a deed, that she is acquainted with its contents, and that they are familiarly known to her, he would be justified in certifying that she was made acquainted with the contents, and the design of the law would be accomplished, although the officer imparted no information to her. *Ib.*
8. ———: EVIDENCE. Where a married woman testifies to what occurred before the notary who took her acknowledgment to a deed, it is competent to cross-examine her as to all that occurred in reference to the matter. *Ib.*
9. UNITED STATES COLLECTOR'S DEED: VOID ON FACE, WHEN: STATUTE. A deed by the United States collector of internal revenue, made under a seizure and sale of real estate for taxes, is void on its face when it appears therefrom that the twenty days' notice of the sale, required by Revised Statutes of United States, section 3197, was not given to the defendant in such proceeding. *Dow v. Chandler*, 245.
10. ———: IRREGULARITIES: SHERIFF'S DEED. Mere irregularities in the suit, which led to a sale under execution, do not invalidate the sheriff's deed. *Brown v. Walker*, 262.
11. ———: IMPERFECT DESCRIPTION: EVIDENCE. An imperfect description of land contained in the tax bill, judgment, execution and sheriff's deed, may if the ambiguity is latent and susceptible of oral explanation, be made certain by extrinsic evidence; and it is sufficient if the description is such that the land can be located by one acquainted with the plats and surveys. *Ib.*
12. SHERIFF'S DEED, AMENDMENT OF. Where a sheriff's deed is defective as in failing to state the date and amount of judgment, he has the right to make another deed and can do so after the expiration of his term of office. *Bush v. White*, 339.
13. ———: TITLE CONFERRED BY RELATION. A sheriff's deed relates back to the date of the judgment lien and operates to transfer the title of the judgment debtor as of that date and the same is true of his amended deed. *Ib.*
14. SHERIFF'S DEED: RECITAL AS TO PLACE OF SALE. A recital in a sheriff's deed that he made the sale at the court house, will be construed as meaning, especially after the lapse of a long time, that it was conducted at the lawful and customary place of making sales. *Ib.*
15. INSANE PERSON: DEED OF GUARDIAN, APPROVAL OF BY COURT. The approval of a sale of land of an insane person made by his guardian, under an order of the court, need not necessarily appear by formal entry of record. It is sufficient if the approval appear from the clerk's minutes. *Moore v. Davis*, 464.

16. **TAX DEED.** The objection that the tax deed by the city collector of Kansas City did not show on its face that the land was sold at the collector's office, and that it was void on its face; *held*, not well taken. *Skinner v. Williams*, 489.
17. ———: **STATUTE OF LIMITATIONS.** The statute of limitations begins to run in favor of a tax deed, not void on its face, from the time it is recorded. *Ib.*
18. **SALE OF LAND FOR TAXES: VOID DEED.** Land offered for sale for taxes and forfeited to the state for want of bidders could not, under the revenue law of 1872 (W. S. chap. 118), be sold again on the same day, and where a tax deed shows that it was so sold, it is void on its face. *Mason v. Crowder*, 526.
19. **LAND, SALE FOR TAXES: SPECIAL STATUTE OF LIMITATIONS.** The three years' special statute of limitations (W. S., sec. 221, p. 1207), in cases of land sold for taxes, is no bar to a recovery by the former owner where the purchaser has not been in possession three years after the recording of the tax deed, and before the commencement of the action against him. *Ib.*

On Re-hearing.

20. **TAX DEED VOID ON ITS FACE: LIMITATIONS.** A tax deed void on its face will not set such special statute of limitations in motion. *Ib.*
21. **QUIT-CLAIM DEED: SUIT FOR PURCHASE PRICE OF LAND.** Plaintiff bought land of the defendant Barton county, receiving a quit-claim deed therefor, which land defendant had previously sold to another. Plaintiff sold the land and it does not appear that his grantee was ever disturbed in his possession. *Held*, that plaintiff received what he bargained for, and cannot recover in a suit against the county for the purchase price. *Harkless v. Barton County*, 619.
22. **DEED, DELIVERY OF: ACCEPTANCE: PRESUMPTION.** When a deed to a minor from its father, is absolute in form, and for its benefit, and the grantor voluntarily causes it to be recorded, acceptance by the grantee will be presumed, and such facts constitute a *prima facie* delivery of the deed, and raise a presumption, which it will require clear proof to overthrow, that the grantor intended to part with his title. *Tobin v. Bass*, 654.
23. **THE EVIDENCE in this case held not sufficient to rebut such presumption.** *Ib.*
24. **WILL, PROBATE OF IN COMMON FORM: SETTING ASIDE WILL IN CIRCUIT COURT ON CONTEST IN SOLEMN FORM: INTERMEDIATE CONVEYANCE.** A testatrix died seized of real estate, which, by her will, she devised to her husband. The will was duly admitted to probate in the probate court, but afterwards, in a proceeding by the heirs of the testatrix instituted under the statute (R. S., sec. 3980) within five years after the probate in the probate court, the will by the judgment of the circuit court was declared not to be the will of the deceased; *held*, that a conveyance of the land by the husband, after the probate in the probate court and before the institution of the suit by the heirs to contest the validity of the will, passed no title. *Hughes v. Burriss*, 660.

DEMAND.

See PENALTY.

DEMURRER.

1. PRACTICE : DEMURRER. Where there is any evidence at all to sustain an issue, a demurrer to the evidence should not be sustained. *Baum v. Fryrear*, 151.
2. SEMBLE that a demurrer to the evidence can be interposed to the plaintiff's evidence in an equity case as well as in an action at law. *Leeper v. Bates*, 224.
3. THE DEMURRER to the evidence in this action, which was one to set aside a deed for being in fraud of creditors; *held*, improperly sustained, because, under the pleadings and the evidence, the defendant should have been required to furnish some proof of the honesty and good faith of the conveyance to him. *Ib.*
4. DEMURRER TO EVIDENCE. The rule is well settled as to a demurrer to the evidence that if there is any evidence tending to prove the issues of fact, the case must go the jury. *Groll v. Tower*, 249.
5. ——— : NEGLIGENCE. Where plaintiff seeks to recover for the death of her husband, alleged to have resulted from a fall caused by the negligence of the defendant, his employer, in furnishing a defective platform, and the evidence fails to show to fall of the deceased, a demurrer thereto is properly sustained. *Ib.*

See RAILROADS. 3.

DISCRETION OF COURT.

1. CHANGE OF VENUE : DISCRETION OF TRIAL COURT. Where the court hears evidence for and against an application for a change of venue in a criminal case, based upon the ground of the prejudice of the inhabitants of the county against the defendant, its action upon the application is final, unless it is shown that it abused its discretion. *The State v. Wilson*, 134.
2. ——— : CONTINUANCE : DISCRETION OF COURT. Granting and refusing applications for continuance are matters always resting largely in the discretion of the trial court, and unless it clearly appears that such discretion has been unsoundly exercised, the Supreme Court will not interfere. *Ib.*

See PRACTICE CIVIL, 14.

DOWER.

DOWER : SETTLEMENT IN BAR OF : STATUTE. Under Revised Statutes, section 2202, concerning dower, a settlement to be in bar of dower must be expressed on its face to be in discharge of the same. *Dudley v. Davenport*, 462.

INDEX.

DOGS.

See FEES.

EJECTMENT.

1. LAND, SALE FOR TAXES: CESTUI QUE TRUST: REDEMPTION: EJECTMENT. Where a deed of trust is of record and the *cestui que trust* was not made a party to the tax suit, he may redeem the land by paying off the judgment and may thus assert his title under the deed of trust. But in ejectment, where the pleadings present, as the only issue, the question of the mere legal right to the possession, the title under the judgment for taxes will prevail as against the one claimed under the deed of trust. *Cowell v. Gray*, 169.
2. ———: EJECTMENT: JUDGMENT. In an ejectment suit, the fact that in a back tax suit, a single judgment was rendered against distinct lots, cannot be shown by parol for the purpose of impeaching such judgment. *Brown v. Walker*, 262.
3. EJECTMENT: PURCHASER AT TAX SALE: DEFENCE. In an action of ejectment by a purchaser at a tax sale, the fact that the sheriff sold two lots together cannot be set up as a defence. *Ib.*
4. ———: JUDGMENT: LANDLORD AND TENANT. A judgment in ejectment is properly rendered against both the landlord and tenant in possession. *Ib.*

ELECTIONS.

1. POLL BOOKS, ETC., INSPECTION OF: CITY OF ST. LOUIS. One whose object is to vindicate some public or private right is entitled to inspect the registration lists, poll books, and lists in the custody of the recorder of voters of the city of St. Louis and used at an election in said city. *The State ex rel. Thomas v. Hoblitzelle*, 620.
2. MANDAMUS. Mandamus will lie to compel the recorder of voters to grant such inspection. *Ib.*

EQUITY.

1. ———: PLEADING: EQUITY. A petition which alleges a fraudulent combination by which the defendants procured a sale of property under a deed of trust and became the purchasers, presents a case for equitable relief in favor of the owner of the equity of redemption. *Baier v. Berberich*, 50.
2. EQUITY PRACTICE. Where a jury, empaneled to try an issue in an equity case, fails to agree, the court may refuse to call another jury, and may decide the case on the evidence it has already heard before the jury which disagreed. *Keithley v. Keithley*, 217.

3. ———. The court in an equity case is not bound to submit issues to a jury, or to accept as its own the finding of a jury. *Ib.*
4. EQUITY PRACTICE. If in a suit in equity the complainant fails to make a case on the evidence, the chancellor may at once and without hearing any evidence, on defendant's behalf, dismiss the bill. *Leeper v. Bates*, 224.
5. SEMBLE that a demurrer to the evidence can be interposed to the plaintiff's evidence in an equity case as well as in an action at law. *Ib.*
6. THE DEMURRER to the evidence in this action, which was one to set aside a deed for being in fraud of creditors, *held*, improperly sustained, because, under the pleadings and the evidence, the defendant should have been required to furnish some proof of the honesty and good faith of the conveyance to him. *Ib.*
7. EQUITY: SALE OF LAND: SPECIFIC PERFORMANCE. A court of equity will decree the specific performance of a contract for the sale of land against one who accepts a deed with the knowledge, on his part, of the right of another to enforce such specific performance against the grantor. *Thompson v. Henry*, 451.
8. CONTRACT: BREACH OF: EQUITY. Where the damages arising from a breach of contract are not capable of fair estimation, and are such as cannot be fully compensated by an action at law, equity will interfere to restrain such breach. *The Springfield Ry. Co. v. The City of Springfield*, 674.
9. EQUITY: FRANCHISE. Equity will interfere to protect and secure the enjoyment of a franchise given by statute, because it affords the only plain and adequate remedy for the wrong. *Ib.*
10. ———: ———. Equity will protect rights of a like character as required under city ordinances. *Ib.*

EQUITY OF REDEMPTION.

See EJECTMENT, 1.

EQUITY.

ESTOPPEL.

1. RECITAL IN DEED: ESTOPPEL. Where the deed under which a defendant claims, contains recitals of the assumption of the payment of certain notes by him he can no more deny such recitals than he can any other recital contained in the deed. *Fitzgerald v. Barker*, 13.
2. ASSUMPTION OF ANOTHER'S DEBT: ESTOPPEL. Where one, for a valuable consideration, assumes the payment of certain notes, he will be estopped from denying their existence at the time he assumed their payment. *Ib.*

3. **NO ESTOPPEL IN CONSEQUENCE OF COMPLYING WITH UNCONSTITUTIONAL STATUTE.** Where a railroad corporation, relying on the presumption that a statute is constitutional, pays money into court, files exceptions, and takes possession of land, such acts are to be taken as a whole and not by piecemeal, not valid in part and void in part, and if the statute turns out to be unconstitutional, no estoppel will arise against such corporation in consequence of complying with the statutory terms. *St. Louis & San Francisco Railway Company v. Evans & Howard Fire Brick Company*, 307.

EVIDENCE.

1. ——— : **EVIDENCE : ADMISSION.** Where in a suit upon notes certain notes are offered in evidence without objection, this amounts to a tacit admission that they are notes in suit. *Fitzgerald v. Barker*, 13.
2. **PRACTICE : EVIDENCE : APPEAL.** The specific error complained of as to the admission or exclusion of evidence must be pointed out or the objection will not be considered on appeal. *Baier v. Berberich*, 50.
3. ——— : **EVIDENCE.** Defendant in a criminal case cannot complain of an error in the admission of evidence in his own favor. *The State v. Lett*, 52.
4. ——— : ——— : **OBJECTION.** The Supreme Court will not pass upon the admissibility of evidence where the record shows that it was received without objection. *Ib.*
5. ——— : ———. It is competent for the state in a criminal prosecution to offer evidence for the purpose of identifying the instrument with which the crime was committed, and, failing in this, to withdraw the evidence, in a case where it is immaterial and not prejudicial to the defendant. *Ib.*
6. **EVIDENCE : PLAT : MEMORANDUM.** A plat which has not been executed or acknowledged, as the law requires, can have no intrinsic value as a legal plat or record, and is not competent evidence to establish the location of a disputed line. But where the evidence tends to show it has been referred to in descriptions contained in deeds already introduced, it should, with other pertinent evidence, be admitted as a memorandum tending to locate the several parcels of land designated. *Brewington v. Jenkins*, 57.
7. **PRACTICE : EVIDENCE : DEMURRER.** There being evidence to establish both sides of an issue, whether much or little, the legal right to take the verdict of a jury upon it, cannot be denied. *Ib.*
8. **PRACTICE : OBJECTIONS TO EVIDENCE.** Objections to the introduction of evidence should be made at the time it is offered and not be raised by instructions to the jury. *Maxwell v. The Hannibal & St. J. Ry. Co.*, 90.
9. **DEED, ACKNOWLEDGMENT OF BY WIFE : EVIDENCE : CROSS-EXAMINATION.** Where a married woman testifies that she was not made

acquainted with the contents of a deed by the notary taking her acknowledgment to it, it is competent to ask her on cross-examination, whether or not she knew the contents at the time she made the acknowledgment, and informed the notary, in answer to his inquiry to that effect, that she was acquainted with the contents. *Drew v. Arnold*, 128.

10. ———: CERTIFICATE OF OFFICER. Where it appears to the court, or officer taking the acknowledgment of a married woman to a deed, that she is acquainted with its contents, and that they are familiarly known to her, he would be justified in certifying that she was made acquainted with the contents, and the design of the law would be accomplished, although the officer imparted no information to her. *Ib.*
11. ———: EVIDENCE. Where a married woman testifies to what occurred before the notary who took her acknowledgment to a deed, it is competent to cross-examine her as to all that occurred in reference to the matter. *Ib.*
12. CRIMINAL LAW: THREATS: RES GESTAE. While mere threats are not sufficient to palliate a homicide, yet when they occur as a part of the *res gestae*; and are uttered while making an attempt on the life of the person threatened, they may be worthy of consideration, as tending, in connection with such attempt, to lower the grade of homicide when perpetrated by the person threatened. *The State v. Wilson*, 134.
13. ———: EVIDENCE: CONFESSIONS. A confession procured by artifice is not for that reason inadmissible, unless the artifice used was calculated to produce an untrue confession. *The State v. Fredericks*, 145.
14. ———: ———: ———. Mere suggestions or advice to the accused to confess, or even solemn adjurations to do so by one holding no official position, will not render the confession inadmissible. But in all cases the age, experience and constitution of the person making the confession and the circumstances under which it was made should be taken into consideration in determining the question of its admissibility. *Ib.*
15. ———: ———: DECLARATIONS OF CONSPIRATOR. After the accomplishment or abandonment of the common enterprise, no declaration of one conspirator will affect another and should be excluded as to the latter. *Ib.*
16. ———: WITHDRAWING EVIDENCE BY INSTRUCTION. Where a specific objection to improper evidence is overruled and it goes to the jury with the sanction of the court, the error will not be cured by withdrawing it by instruction, if it is of such character as to prejudice defendant's case. *Ib.*
17. PARTNERSHIP: DEBT: RELEASE: EVIDENCE. In an action against a member of a dissolved partnership for a debt of the partnership, where the defence is a release of the defendant by the creditor, and the acceptance of the new partnership as the debtor, pleadings and papers in an action of attachment against the new partnership by the creditor for his debt are admissible to show the intention to release. *Baum v. Fryrear*, 151.

18. ———: EVIDENCE. In an action against a bank by the drawer of a check for the conversion of the sum for which it was drawn, the bank can show its proper payment to the holder without specially pleading such payment. The check being rightfully paid there could be no conversion. *Albers v. The Commercial Bank*, 173.

19. EVIDENCE: DEFENDANT'S STATEMENTS. Where, on the trial in a criminal case, the state proves statements of the defendant made after the commission of the offence, he is entitled to the benefit of what he said for himself, if true, as is the state to the benefit of what he said against himself. What he said against himself the law presumes to be true, because made against himself. But what he said for himself the jury are not bound to believe, because said in a conversation proved by the state, and may believe it, or disbelieve it, as may be shown to be true, or false, by the evidence in the case. *The State v. Peak*, 190.

20. ———: EVIDENCE. On a trial under the statute for being an accessory after the fact in the larceny of a horse by one F., declarations of the latter that defendant participated in the stealing of another horse about the same time, and belonging to another person than the one from whom the first horse was stolen are inadmissible in evidence. *The State v. Reed*, 194.

21. FRAUD, ACTION UPON ACCOUNT: AGENCY: PARTNERSHIP: EVIDENCE. In an action upon an account for merchandise sold, where it is sought to connect the defendant with the purchaser of the goods by showing by circumstantial evidence that the latter acted as defendant's partner and general agent and clerk, and that he ordered other goods and signed defendant's name to notes, and managed mills and threshing machines for defendant, it is error to admit in evidence, to show that defendant bought the goods or ordered them to be bought for him, notes given by defendant to other parties, and notes made by other parties to strangers, and an interplea by defendant, claiming a threshing machine and its earnings, in a suit between the purchaser of the goods and a third party. *Field v. Stubblefield*, 199.

22. PRACTICE IN SUPREME COURT: EVIDENCE: IMMATERIAL ERROR. Although the testimony of the surviving party to a cause of action was improperly admitted in evidence, yet the Supreme Court will not, for that reason, reverse the judgment where the matters of such testimony were testified to by other witnesses and were not contradicted. *Julian v. Calkins*, 202.

23. THE EVIDENCE in this case held to support the finding of the lower court, that the defendant's grantor had sufficient mental capacity to make a conveyance of land to him. *Keithley v. Keithley*, 217.

24. WITNESS: PHYSICIAN, COMPETENCY OF: STATUTE. Under Revised Statutes, section 4017, relating to persons who are incompetent to testify, the evidence of an attending physician, if offered by the patient or his representative, is competent. Where it is offered by the opposite party the physician cannot testify against the objection of the patient, or his representative. *Gartside v. Insurance Company*, 76 Mo. 446, distinguished. *Groll v. Tower*, 249.

25. **CRIMINAL LAW: FALSE PRETENSES.** The evidence in this case held sufficient to sustain a conviction under Revised Statutes, section 1561, for obtaining money by means of false pretenses. *The State v. Cooper*, 256.
26. ——— : **EVIDENCE.** Transactions, although extending over several days, and occurring at different times, but having in view the common object of the commission of the crime, are admissible in evidence. *Ib.*
27. ——— : **IMPERFECT DESCRIPTION: EVIDENCE.** An imperfect description of land contained in the tax bill, judgment, execution and sheriff's deed, may, if the ambiguity is latent and susceptible of oral explanation, be made certain by extrinsic evidence: and it is sufficient if the description is such that the land can be located by one acquainted with the plats and surveys. *Brown v. Walker*, 262.
28. **EVIDENCE: PUBLIC ACTS.** Acts of congress confirming land titles in Missouri are public acts, and will, therefore, be judicially noticed by the courts. *Wood v. Nortman*, 298.
29. ———. Under Revised Statutes, section 2280, certified copies of the surveys of lands from the files of the office of the register of lands of this date, are admissible in evidence. *Ib.*
30. **EVIDENCE.** Insuring property in one's name is admissible in evidence to show that the insured managed and controlled it as her own. *Bettes v. Magoon*, 580.
31. **DOCUMENTARY EVIDENCE: BILL OF EXCEPTIONS.** Where error is complained of in the admission in evidence of written documents, such documents, or so much thereof as relate to the point of objection, should be preserved in the bill of exceptions. *Ib.*
32. **EVIDENCE: PROVINCE OF JURY.** As a general rule positive testimony will outweigh that which is negative in its character, but it is for the jury to determine what weight they will give to all the testimony under the circumstances of a particular case. *The State v. Gee*, 647.
33. ——— : ——— : **EVIDENCE: TAKING: INTENT.** Where one obtains possession of a deed of release under the pretense that it was only for a temporary purpose, and after so securing possession of it, has it placed upon record, this is such a trick or artifice as amounts to a constructive taking and is evidence of an original felonious intent. *The State v. Hall*, 669.
34. ——— : **INTENT.** The intent with which one does an act is properly presumed to be that which was its natural consequence, and may be gathered from his subsequent contract, conversations, and letters in relation to such act. *Ib.*

See RAILROADS, 26.

EXECUTIONS.

1. **EXECUTION.** A judgment creditor is entitled to an execution as a matter of course for the purpose of enforcing his judgment. *Bush v. White*, 339.
2. ——— : **STATUTE.** The act of the legislature of March 23, 1863 (Acts, p. 19), relating to executions, does not assume to restrict such judgment creditor in his right to such execution. That act relates only to the extension and revival of liens of unsatisfied executions and provides for a method of enforcing them by renewed execution without the necessity of a re-levy upon the property originally covered by them. *Ib.*
3. **EXECUTION SALE, SETTING ASIDE OF.** Where, on inquiry at the office of the sheriff by the attorney of a defendant in an execution, he is informed by a deputy in charge of the office, that the sale of the property levied on, consisting of three hundred and thirty-three shares of stock in a corporation, will take place at twelve o'clock on the day of sale, and subsequently the sale is made in mass at ten o'clock, in the absence of the defendant or his attorney, and without their knowledge, and at a great sacrifice of the value of the property, such sale will be set aside, on timely application, on motion of defendant. *American Wine Co. v. Scholer*, 496.
4. ———. A court has power over its own process, and can set aside an execution sale, on motion, certainly, at or before the return term of the writ. *Ib.*

EXECUTORY CONTRACTS.

See **CONTRACTS**, 1

EXEMPTIONS.

See **HOMESTEADS AND EXEMPTIONS**.

EXPRESS COMPANY.

EXPRESS COMPANY : AGENT : BOND. Where an express company seeks to recover on the bond of its agent for its breach in receiving a package to be forwarded to its destination and which was not forwarded or accounted for, it must show that the defendant received the package as its agent. *The Southern Express Co. v. Moeller*, 208.

FALSE IMPRISONMENT.

CORPORATIONS : MALICIOUS PROSECUTION : FALSE IMPRISONMENT. A corporation is liable to an action for false imprisonment, or for malicious prosecution instituted by its authority. Affirming *Boogher v. Life Association of America*, 75 Mo. 319; *Woodward v. The St. Louis & San Francisco Ry. Co.*, 142.

FALSE PRETENSES.

See CRIMINAL LAW, 14, 15, 16.

FEES.

1. OFFICERS, FEES OF. No fees are allowed an officer, except where expressly given and allowed by law. *Williams v. Chariton County*, 645.
2. ——— : ASSESSOR ; LISTING OF DOGS. Dogs are assessed in the list of personal property, and the assessor is allowed no increase in his emoluments for assessing them. *Ib.*

FELLOW SERVANT.

See MASTER AND SERVANT.

FISH LAW.

See CRIMINAL LAW, 17, 18.

FRAUD.

1. FRAUD : ACTION UPON ACCOUNT : AGENCY : PARTNERSHIP : EVIDENCE. In an action upon an account for merchandise sold, where it is sought to connect the defendant with the purchaser of the goods by showing by circumstantial evidence that the latter acted as defendant's partner and general agent and clerk, and that he ordered other goods and signed defendant's name to notes, and managed mills and threshing machines for defendant, it is error to admit in evidence, to show that defendant bought the goods, or ordered them to be bought for him, notes given by defendant to other parties, and notes made by other parties to strangers, and an interplea by defendant, claiming a threshing machine and its earnings, in a suit between the purchaser of the goods and a third party. *Field v. Stubblefield*, 199.
2. FRAUDULENT CONVEYANCE. The decree of the lower court refusing to set aside a conveyance of land as being in fraud of creditors, affirmed. *Summers v. Akers*, 213.
3. FRAUD. The finding of the lower court that a deed to land was obtained by the fraud of the grantee, and that a purchaser from the latter took with notice of such fraud, affirmed. *Williams v. Tutt*, 472.
4. CONVEYANCE : FRAUD : EVIDENCE. The allegations of the petition in this case to the effect that the conveyance by defendant to his wife was in fraud of creditors, held, unsupported by the evidence. *Burgess v. McLean*, 678.

FRAUDULENT CONVEYANCES.

See FRAUD 2, 3, 4.

GENERAL LAW.

See LAWS.

GRAND JURY.

GRAND JUROR, DISCHARGE OF. *The State v. Wilson*, 134.

GUARDIAN AND WARD.

1. GUARDIAN OF MINOR, AUTHORITY OF. The consent of a guardian of a minor that the sheriff shall receive the purchase money before the expiration of the time of credit named in the order of sale is binding on the ward. *The State ex rel. Rice v. Cayce*, 456.
2. INSANE PERSON: DEED OF GUARDIAN, APPROVAL OF BY COURT. The approval of a sale of land of an insane person made by his guardian, under an order of the court, need not necessarily appear by formal entry of record. It is sufficient if the approval appear from the clerk's minutes. *Moore v. Davis*, 464.

HABEAS CORPUS.

PROHIBITION. A writ of prohibition denied in this case, the object of which was to prohibit a circuit judge from further proceeding in a *habeas corpus* matter pending before him. *The State ex rel. Spickerman v. Fox*, 61.

HEAD OF FAMILY.

See HOMESTEADS AND EXEMPTIONS.

HOMESTEADS AND EXEMPTIONS.

1. ———: RESERVATION OF PROPERTY EXEMPT BY LAW. A deed of assignment is not void as a matter of law because it contains a general reservation in the assignor of the property exempt by law from seizure for his debts. *Hartzler v. Tootle*, 23.
2. HOMESTEAD: ABANDONMENT: HEAD OF FAMILY. A husband with his wife occupied premises in this state as a homestead, until forced to leave, about the close of the war, by the disturbed condition of the country, when they removed to Iowa, where he shortly afterwards died. The wife, who had no children, then returned to the homestead and resided thereon, keeping house with her brother. *Held*, (1) There was no abandonment of the homestead, and (2) that she was the head of a family within the meaning of the homestead law. *Leake v. King*, 413.

3. **HOMESTEAD, MORTGAGE OF.** It was not necessary, under 1 Wagner's Statutes, page six hundred and ninety-seven, section one, that the wife should join with the husband in executing a mortgage upon the homestead to make it valid; but it is otherwise since the enactment of section 2689 of the Revised Statutes of 1879. *Riecke v. Westenhoff*, 642.

HOMICIDE.

—: **MURDER: INSTRUCTIONS FOR LOWER GRADE OF HOMICIDE.** In a prosecution for murder, where the instructions given on behalf of defendant, based upon his own testimony, allow a finding for a grade of homicide less than murder, it is reversible error to fail to define such lower grade of crime of which defendant might, under the evidence, be convicted. *The State v. Wilson*, 134.

HORSE RAILWAYS.

See MUNICIPAL CORPORATIONS, 1.

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE: STATUTE.** Under Revised Statutes, section 3296 (*Ibid*, Acts 1875, p. 61), a husband can make a gift to his wife of personal property without the aid of a trustee or writing evidencing the gift, and without declaring the gift to be for her sole and separate use. *Bettes v. Magoon*, 580.
2. **HOMESTEAD, MORTGAGE OF.** It was not necessary, under 1 Wagner's Statutes, page six hundred and ninety-seven, section one, that the wife should join with the husband in executing a mortgage upon the homestead to make it valid; but it is otherwise since the enactment of section 2689 of the Revised Statutes of 1879. *Riecke v. Westenhoff*, 642.

IMPERFECT DESCRIPTION.

See DEEDS, 11.

INDICTMENT.

See PLEADING CRIMINAL.

INJUNCTION.

1. **INJUNCTION: ILLEGAL TAXES: CLOUD UPON TITLE.** Injunction is the proper remedy to prevent the sale of real estate for illegal taxes, whereby a cloud would be cast upon the title. *The North St. Louis Gymnastic Society v. Hudson*, 32.
2. **INJUNCTION.** Injunction will lie to restrain the collection of notes included in a settlement of accounts previously had between the parties. *Melcher v. The Exchange Bank of Jefferson City*, 362.

3. ———. The injunction in this case held improperly granted by the trial court, because the evidence did not show that the notes were included in the settlement as claimed by plaintiff. *Ib.*

INSANE PERSON.

1. **INSANE PERSON : DEED OF GUARDIAN, APPROVAL OF BY COURT.** The approval of a sale of land of an insane person made by his guardian, under an order of the court, need not necessarily appear by formal entry of record. It is sufficient if the approval appear from the clerk's minutes. *Moore v. Davis*, 464.
2. **PROBATE COURT : INSANE PERSON ; SETTING ASIDE JUDGMENT.** A probate court can, at a subsequent term, set aside its judgment adjudging a person insane and appointing a guardian for him. *In the matter of Marquis*, 615.
3. ——— : ——— : ———. It is sufficient ground for setting aside such judgment that it does not appear from the record that the alleged insane person was notified of the proceeding against him, and if not notified, the reason therefor. *Ib.*

INSTRUCTIONS.

1. **INSTRUCTIONS : REVERSAL.** The judgment of the St. Louis court of appeals reversing that of the circuit court affirmed, because of the action of the latter court in giving an instruction not authorized by the evidence. *Skyles v. Bollman*, 35.
2. ——— : INSTRUCTION. It is proper to instruct the jury that if a witness wilfully swears falsely to any material fact in the case, they may disregard his entire testimony, but this rule cannot be applied to a case of mere mistake on the part of the witness. *The State v. Lett*, 52.
3. **INSTRUCTIONS.** Instructions are properly refused which assume the truth of material facts, or ignore material facts, or assert inapplicable abstract propositions of law. *Maxwell v. The Hannibal & St. Joseph Railway Company*, 95.
4. **PRACTICE : INSTRUCTIONS.** An instruction which is misleading or which ignores the only real matter in issue under the pleadings, is properly refused. *Greer v. Parker*, 107.
5. ——— : ——— : INSTRUCTIONS : NEW TRIAL. It is no ground for a new trial that the instructions given by the court had been lost after trial. Where the instructions are not contained in the record, it will be presumed that the action of the trial court in giving them was not erroneous. *Porth v. Gilbert*, 125.
6. ——— : MURDER : INSTRUCTIONS FOR LOWER GRADE OF HOMICIDE. In a prosecution for murder, where the instructions given on behalf of defendant, based upon his own testimony, allow a finding for a

grade of homicide less than murder, it is reversible error to fail to define such lower grade of crime of which defendant might, under the evidence, be convicted. *The State v. Wilson*, 134.

7. CRIMINAL LAW : PRACTICE : INSTRUCTIONS. Upon appeal from a conviction of murder in the second degree an error in an instruction for murder in the first degree is immaterial, and such instruction will not be reviewed by the Supreme Court. *The State v. Kelly*, 143.
8. ——— : INSTRUCTIONS. It is not error to refuse an instruction embodied in others given. *Ib.*
9. ——— : WITHDRAWING EVIDENCE BY INSTRUCTION. Where a specific objection to improper evidence is overruled and it goes to the jury with the sanction of the court, the error will not be cured by withdrawing it by instruction, if it is of such character as to prejudice defendant's case. *The State v. Fredericks*, 145.
10. PRACTICE : INSTRUCTIONS. It is not error to refuse an instruction embodied in one given. *Baum v. Fryrear*, 151.
11. ——— : ———. It is not error to refuse instructions asked where the principles embodied in them are embraced in others given. *The State to use Stanley v. The St Louis Brokerage Company*, 411.
12. ——— : ———. An instruction asked is properly refused when there is no evidence upon which to base it. *Ib.*
13. MURDER : MANSLAUGHTER : SELF-DEFENCE : INSTRUCTIONS. A series of instructions upon the law of murder, manslaughter, and self-defence, approved. *The State v. Gee*, 647.

See NEGLIGENCE, 8.

INTENT.

See CRIMINAL LAW, 23, 24.

INTEREST.

See PRACTICE, CIVIL, 40.

REMITTITUR.

IRREGULARITIES.

See DEEDS, 10.

JUDGMENTS.

1. JUSTICE'S COURT : JUDGMENT BY DEFAULT : MOTION TO SET ASIDE : AP-

PEAL BOND: SURETIES, JUDGMENT AGAINST. Where an appeal is taken from a judgment by default before a justice, without the party aggrieved having, within ten days from the rendition of the judgment, moved to set the same aside, it is properly dismissed, on motion, in the circuit court. R. S., sec. 3040. The justice, in such case, having no power to grant the appeal, the appeal bond is void, so far as the sureties are concerned, and the circuit court cannot enter judgment against them, but can only dismiss the appeal and enter judgment for costs against the appellant. *Brown v. The Missouri Pacific Ry. Co.*, 123.

2. JUDGMENT, ASSIGNEE OF: NOTE. The assignee of a judgment of allowance in the probate court rendered on a note has the better title and, hence the legal right to enforce payment as against one to whom the note was transferred after the rendition of the judgment. *Julian v. Calkins*, 202.
3. THE JUDGMENT of the trial court in this case held sufficiently formal. *Moody v. Deutsch*, 237.
4. BACK TAXES: STATUTE: JURISDICTION: JUDGMENT. In an action to collect back taxes, under the act of 1877, the circuit court does not exercise its jurisdiction in a special or summary manner, and its judgments therein are entitled to the same presumptions as attend its ordinary judgments. *Brown v. Walker*, 262.
5. ———: ———: ———: ———. In such a suit a single judgment against several distinct lots is erroneous; but the objection does not go to the jurisdiction. *Ib.*
6. ———: EJECTMENT: JUDGMENT. In an ejectment suit, the fact that in a back tax suit, a single judgment was rendered against distinct lots, cannot be shown by parol for the purpose of impeaching such judgment. *Ib.*
7. ———: JUDGMENT: LANDLORD AND TENANT. A judgment in ejectment is properly rendered against both the landlord and tenant in possession. *Ib.*
8. PRACTICE: PARTIES: JUDGMENT. The Supreme Court may reverse a judgment as to some of the appellants, and affirm it as to others. R. S., secs. 3570, 3582, 3583. *Mansfield v. Allen*, 502.
9. PRACTICE IN SUPREME COURT: ASSIGNMENT OF JUDGMENT: SUBSTITUTION. Where one in his lifetime assigns a judgment in his favor and dies pending an appeal to the Supreme Court, the assignee will be substituted as a party in his stead in the latter court. R. S., sec. 3671. *Neilon v. The Kansas City, St. Jo. & C. B. Ry. Co.*, 599.
10. PROBATE COURT: INSANE PERSON: SETTING ASIDE JUDGMENT. A probate court can, at a subsequent term, set aside its judgment adjudging a person insane and appointing a guardian for him. *In the Matter of Marquis*, 615.
11. ———: ———: ———. It is sufficient ground for setting aside

such judgment that it does not appear from the record that the alleged insane person was notified of the proceeding against him, and if not notified, the reason therefor. *Ib.*

JUDICIAL NOTICE.

1. ———: RECITALS IN MOTION: JUDICIAL NOTICE. In a case of conviction of a negro, where the motion for new trial recites that there were no negroes returned on the panel of forty, from which the jury was selected to try the cause, but there is nothing in the record to show whether the panel was white or black, or whether the population of the county consists in part of negroes, such recitals do not constitute evidence of these facts, and the Supreme Court will not take judicial notice of them, and will not review the point. *The State v. Wilson*, 134.
2. JUDICIAL NOTICE. A court will take judicial notice of the fact that the first Monday in October, 1873, was the sixth of October of that year. *Mason v. Crowder*, 526.

JURISDICTION.

1. BACK TAXES: STATUTE: JURISDICTION: JUDGMENT. In an action to collect back taxes, under the act of 1877, the circuit court does not exercise its jurisdiction in a special or summary manner, and its judgments therein are entitled to the same presumptions as attend its ordinary judgments. *Brown v. Walker*, 262.
2. ———: ———: ———: ———. In such a suit a single judgment against several distinct lots is erroneous; but the objection does not go to the jurisdiction. *Ib.*
3. JURISDICTION: SPECIAL TAX BILLS: CIRCUIT COURT OF JACKSON COUNTY. The circuit court of Jackson county has concurrent jurisdiction with the recorder of Kansas City and justices of the peace of actions to enforce the liens of special tax bills when the amount sued for is three hundred dollars or less (overruling *Williams v. Payne*, 80 Mo. 409). *Tackett v. Vogler*, 490.
4. ———. Where a court possesses jurisdiction over a subject, the mere vesting of jurisdiction over the same subject in another court will not exclude the jurisdiction of the former court. To effect such result express words of exclusion must be used or the law conferring jurisdiction on the first court must be repealed. *Ib.*

JURORS.

1. JURY, PROVINCE OF. It is for the jury and not for the court to pass on the credibility of witnesses; to determine the weight to be given to their testimony and to reconcile conflict therein. *Coudy v. The St. Louis, I. M. & S. Ry. Co.*, 79.
2. ———: JUROR, QUALIFICATION OF. One who has formed or expressed an opinion of the guilt or innocence of the accused from rumor or newspaper reports, is not thereby disqualified from serving

as a juror on the trial of the cause. Distinguishing *State v. Culler*, 82 Mo. 623. *The State v. Wilson*, 134.

3. ——— : ———. One who had formed an opinion from rumor and newspaper reports, and who said on his *voir dire* that he "would naturally suppose defendant guilty," does not thereby give evidence of bias or prejudice against defendant, and is not disqualified for that reason to sit as a juror in the trial of the cause. *Id.*
4. CRIMINAL PRACTICE: MISCONDUCT OF JURORS. Affidavits of jurors will not be received to show their own misconduct, nor will evidence of their declarations, made after the trial, to third persons, be received for such purpose. *The State v. Cooper*, 256.
- CAUSE OF CHALLENGE OF JUROR. EXPRESSIONS OF PREJUDICE BY. *The State v. Burns*, 47.

JURY.

See JURORS.

JUSTICES' COURTS.

1. JUSTICE'S COURT: JUDGMENT BY DEFAULT: MOTION TO SET ASIDE: APPEAL BOND: SURETIES, JUDGMENT AGAINST. Where an appeal is taken from a judgment by default before a justice, without the party aggrieved having, within ten days from the rendition of the judgment, moved to set the same aside, it is properly dismissed, on motion, in the circuit court. R. S., sec. 3040. The justice, in such case, having no power to grant the appeal, the appeal bond is void, so far as the sureties are concerned, and the circuit court cannot enter judgment against them, but can only dismiss the appeal and enter judgment for costs against the appellant. *Brown v. The Missouri Pacific Ry. Co.*, 123.
2. APPEALS FROM JUSTICES, WHEN TRIABLE: PRACTICE. Where on an appeal to the circuit court from a justice of the peace the appellant fails to give notice of the appeal and the appellee enters his appearance on or before the second day of the term, the latter is not then entitled to a simple affirmance of the judgment. If he desires determination of the cause at that term, he must offer evidence and try the case *de novo*. *Priest v. The Missouri Pacific Ry. Co.*, 521.

LAND AND LAND TITLES.

1. TAXES: ACTION TO ENFORCE LIEN FOR: STATUTE. The "owner of the property" against whom, under Revised Statutes, section 6837, actions to enforce liens for taxes must be brought, is the person appearing of record to be the owner, in the absence of notice to the contrary, and unless the suit is against such owner a sale under a judgment therein will convey no title. *Cowell v. Gray*, 169.
2. LAND, SALE FOR TAXES: CESTUI QUE TRUST: REDEMPTION: EJECTMENT. Where a deed of trust is of record and the *cestui que trust*

was not made a party to the tax suit, he may redeem the land by paying off the judgment and may thus assert his title under the deed of trust. But in ejectment, where the pleadings present, as the only issue, the question of the mere legal right to the possession, the title under the judgment for taxes will prevail as against the one claimed under the deed of trust. *Ib.*

3. LAND AND LAND TITLES: ST. LOUIS COMMON FIELD LOTS: ACT OF CONGRESS OF JUNE 12, 1812. It is the settled construction of the act of congress of June 12, 1812 (2 U. S. Statutes at Large, 748), that the act, by the force of its own terms, vested in each inhabitant of the then village of St. Louis the title in fee to the common field lot which he possessed or cultivated prior to December 20, 1803, the date of the cession from France to the United States. Said act conferred on such inhabitant the lot so possessed or cultivated without any conditions of survey, or without any other or further proof of title derived from the Spanish or French government than that of inhabitancy and cultivation or possession. *Glasgow v. Lindell's Heirs*, 50 Mo. 60, and *Glasgow v. Baker*, 72 Mo. 441, re-affirmed. *Glasgow v. Baker*, 559.
4. ———: ———: ———. The confirmees under the act of congress of 1812 by complying with the act of congress of May 24, 1824 (4 U. S. Stat. at Large 65), making it their duty to designate their out lots by making proof of their boundaries, possession, and cultivation before the recorder, secured a recognition of the boundaries, but there was no forfeiture by reason of their failure to do so. The confirmee still held the title by force of the act of 1812. *Ib.*
5. ———: ———: ———. The title confirmed by the act of 1812 is a good title, although the surveyor general failed to include the land within the boundaries of the survey made by him. *Ib.*
6. ———: ———: ———. The act of congress of March 6, 1820, granting the sixteenth section in each township for school purposes did not extend to any of the common field lots confirmed by the act of 1812; not even to those not rightfully owned by the individuals claiming them. *Ib.*

LANDLORD AND TENANT.

———: JUDGMENT: LANDLORD AND TENANT. A judgment in ejectment is properly rendered against both the landlord and tenant in possession. *Brown v. Walker*, 262.

LARCENY.

OF DEED. *The State v. Hall*, 669.

LAWS.

WHAT IS A GENERAL AND WHAT A SPECIAL LAW. *Ewing v. Hoblitzelle*, 64.

LIBEL AND SLANDER.

1. PROSECUTIONS FOR LIBEL AND SLANDER: STATUTE, CONSTRUCTION OF. Revised Statutes, section 1564, which provides that, "in all prosecutions for libel or verbal slander, the truth thereof may be given in the evidence to the jury, and shall constitute a complete defence. And the jury under the direction of the court shall determine the law and the fact," is but a re-assertion of the rule that the jury should receive from the court the law applicable to the testimony in the cause and find the issues of fact thereunder, as in other cases. *The State v. Hosmer*, 533.
2. ———: PRACTICE: BURDEN OF PROOF. When in a prosecution for libel, the publication of the libelous matter is proved by the state, the burden is then on the defendant to justify the publication. *Ib.*

LIFE ESTATE.

LIFE TENANT: WASTE. A life tenant or his lessee will be enjoined from committing waste at the suit of the owner of the fee. *Hughes v. Burriess*, 660.

See WILLS.

LIMITATIONS.

1. LIMITATION: KNOWLEDGE OF MORTGAGEOR'S ADVERSE POSSESSION. Actual knowledge on the part of the mortgagee of an adverse holding of possession by the mortgageor is not necessary to start the running of the bar of the statute of limitations in favor of the former. *Bush v. White*, 339.
2. MORTGAGE LIEN: WHEN STATUTE OF LIMITATIONS BEGINS TO RUN AGAINST. The statute of limitations begins to run against the lien of the mortgagee as soon as the right of action thereon accrues. *Ib.*
3. MORTGAGEOR'S ABSENCE FROM STATE: STATUTE OF LIMITATIONS. The absence of a mortgagor from the state, occurring after foreclosure of the transfer of his interest in the mortgaged property, will not interrupt the running of the statute of limitations. *Ib.*
4. ———: STATUTE OF LIMITATIONS. The statute of limitations begins to run in favor of tax deed, not void on its face, from the time it is recorded. *Skinner v. Williams*, 489.
5. LAND, SALE FOR TAXES: SPECIAL STATUTE OF LIMITATIONS. The three years' special statute of limitations (W. S., sec. 221, p. 1207), in cases of land sold for taxes, is no bar to a recovery by the former owner where the purchaser has not been in possession three years after the recording of the tax deed and before the commencement of the action against him. *Mason v. Crowder*, 526.

On Re-hearing.

6. **TAX DEED VOID ON ITS FACE: LIMITATIONS.** A tax deed void on its face will not set such special statute of limitations in motion. *Ib.*

MALICIOUS ATTACHMENT.

See **ATTACHMENT**, 1.

MALICIOUS PROSECUTION.

1. **CORPORATIONS: MALICIOUS PROSECUTION: FALSE IMPRISONMENT.** A corporation is liable to an action for false imprisonment, or for malicious prosecution instituted by its authority. Affirming *Boogher v. Life Association of America*, 75 Mo. 319. *Woodward v. The St. Louis & San Francisco Ry. Co.*, 142.
2. **MALICIOUS PROSECUTION, ACTION FOR: MALICE.** Malice is a necessary element in an action for malicious prosecution, and the sufficiency of the proof of such malice is a question for the jury. *Moody v. Deutsch*, 237.

MANDAMUS.

1. **MANDAMUS.** Mandamus will lie to compel the county clerk to assess the school taxes of a district on the taxable property therein, according to its legal limits. *The State ex rel. School District No. 6 v. Riley*, 156.
2. **MANDAMUS: APPEAL.** Mandamus will not lie to relieve against the acts of an inferior court, where the party complaining has a remedy by appeal or writ of error. *The State ex rel. The Evans and Howard Fire Brick Co. v. Lubke*, 338.

See **ELECTIONS**, 2.

MARRIED WOMEN.

1. **DEED, ACKNOWLEDGMENT OF BY WIFE: EVIDENCE: CROSS-EXAMINATION.** Where a married woman testifies that she was not made acquainted with the contents of a deed by the notary taking her acknowledgment to it, it is competent to ask her on cross-examination, whether or not she knew the contents at the time she made the acknowledgment, and informed the notary, in answer to his inquiry to that effect, that she was acquainted with the contents. *Drew v. Arnold*, 128.
2. ———: **CERTIFICATE OF OFFICER.** Where it appears to the court, or officer taking the acknowledgment of a married woman to a deed, that she is acquainted with its contents, and that they are familiarly known to her, he would be justified in certifying that she was made

acquainted with the contents, and the design of the law would be accomplished, although the officer imparted no information to her. *Ib.*

3. ———: EVIDENCE. Where a married woman testifies to what occurred before the notary who took her acknowledgment to a deed, it is competent to cross-examine her as to all that occurred in reference to the matter. *Ib.*

MASTER AND SERVANT.

1. MASTER AND SERVANT: INCOMPETENCY OF LATTER: DRUNKENNESS. Where an employe is injured by the negligent act of another servant resulting from the latter's intoxication, and the employer knew of his intemperate habits and the plaintiff did not, the employer is liable for the injury. *Maxwell v. The Hannibal & St. J. Ry. Co.*, 95.
2. ———: ———. It is immaterial to a recovery in such case whether the servant causing the injury was a fellow servant of the one injured or his superior. *Ib.*
3. FELLOW SERVANTS. They are fellow servants, who, under the direction and management of the master himself, or of some servant placed by the latter over them, are engaged in the prosecution of the same common work without any dependence upon or relation to each other except as co-laborers without rank. *Moore v. The Wabash, St. L. & P. Ry. Co.*, 588.
4. VICE-PRINCIPAL. He is a vice-principal who is entrusted by the master with power to superintend, direct or control the workman in his work, and for negligence in such superintendence, direction or control, the master is liable. *Ib.*
5. ———. The servant of a railway company may rely on the vice-principal's promise to protect him while at work on a side-track, notwithstanding the existence of a rule of the company requiring servants to protect themselves by putting out flags while engaged in such work. *Ib.*

MEMORANDUM.

See EVIDENCE, 6.

MINORS.

1. ———: EMANCIPATION OF SON. Section 2121, of Revised Statutes, is both penal and compensatory, and the emancipation of a minor son by his parents is no defence to an action thereon by them for his death. *Philpott v. The Missouri Pacific Ry. Co.*, 164.
2. ———: ———: MINORS. The land of minors cannot be condemned for railroad purposes without making their guardians defendants in the condemnation proceeding. In case they have no regular guar-

dian, guardians *ad litem* should be appointed. *The Missouri Pacific Ry. Co. v. Carter*, 448.

2. GUARDIAN OF MINOR, AUTHORITY OF. The consent of a guardian of a minor that the sheriff shall receive purchase money before the expiration of the time of credit named in the order of sale, is binding on the ward. *The State ex rel Rice v. Cayce*, 456.

MINORITY: LAWS OF ANOTHER STATE: PRESUMPTION. *Philpott v. Mo. Pac. Ry. Co.*, 164.

MORTGAGEOR AND MORTGAGEE.

See MORTGAGES AND DEEDS OF TRUST.

MORTGAGES AND DEEDS OF TRUST.

1. LAND, SALE FOR TAXES: CESTUI QUE TRUST: REDEMPTION: EJECTMENT. Where a deed of trust is of record, and the *cestui que trust* was not made a party to a tax suit, he may redeem the land by paying off the judgment, and may thus assert his title under the deed of trust. But in ejectment, where the pleadings present, as the only issue, the question of the mere legal right to the possession, the title under the judgment for taxes will prevail as against the one claimed under the deed of trust. *Cowell v. Gray*, 169.
2. MORTGAGEOR: ACQUISITION BY OF OUTSTANDING TITLE. Under the law, as it now prevails in this state, a mortgageor occupies no such subservient relation to the mortgagee as to prevent him from acquiring an outstanding title against the mortgagee. *Bush v. White*, 339.
3. LIMITATION: KNOWLEDGE OF MORTGAGEOR'S ADVERSE POSSESSION. Nor is actual knowledge on the part of the mortgagee of an adverse holding of possession by the mortgageor necessary to start the running of the bar of the statute of limitations in favor of the former. *Ib.*
4. MORTGAGE LIEN: WHEN STATUTE OF LIMITATIONS BEGINS TO RUN AGAINST. The statute of limitations begins to run against the lien of the mortgagee as soon as the right of action thereon accrues. *Ib.*
5. MORTGAGEOR'S ABSENCE FROM STATE: STATUTE OF LIMITATIONS. The absence of a mortgageor from the state, occurring after foreclosure, or the transfer of his interest in the mortgaged property, will not interrupt the running of the statute of limitations. *Ib.*
6. HOMESTEAD, MORTGAGE OF. It was not necessary under 1 Wagner's Statutes, page six hundred and ninety-seven, section one, that the wife should join with the husband in executing a mortgage upon the homestead to make it valid: but it is otherwise since the enactment of section 2699 of the Revised Statutes of 1879. *Riecke v. Westenhoff*, 642.

MUNICIPAL CORPORATIONS.

1. **MUNICIPAL CORPORATION : CHARTER : HORSE RAILWAYS.** The usual powers conferred by its charter on a municipal corporation over its streets are sufficient to authorize it to permit their use for horse railways; *aliter* as to railways operated by steam. *The State ex rel. Kansas City v. The Corrigan Street Railway Company*, 263.
2. ——— : **ORDINANCE : REPAIRING STREET : CONTRACT.** An ordinance of a city giving the privilege of using its street for a horse railway and which contained a provision requiring the railway company to keep and maintain the space between its rails and for two feet on either side of its track, and all street crossings along its line in good repair, does not impose on such company an obligation to re-construct the street, *Ib.*
3. ———. An obligation to repair a street is not an obligation to construct thereon a new pavement. *Ib.*
4. ——— : ——— : **POLICE POWER.** Nor could the city, by a subsequent ordinance, impose on the railway company, without its consent, such additional obligation to pave the street. Such subsequent ordinance cannot be sustained on the ground that it is a proper exercise of the police power of the city. *Ib.*
5. **CITY : STREETS : CORPORATE POWERS.** Nor is an ordinance of the city requiring a horse railway to repair the street between the rails and on the sides of such railway, invalid as being a surrender by the city of its corporate power over its streets. *Ib.*
6. **MUNICIPAL CORPORATIONS : CONTRACTS BY : INVOLABILITY OF.** Where a city, by its ordinance, makes a contract, and the same is accepted and acted on by the other party, it cannot abrogate such contract at pleasure, or destroy the rights so given and acquired. *The Springfield Ry. Co. v. The City of Springfield*, 674.
7. ——— : **ORDINANCES : VALIDITY OF.** While a city council may pass such ordinances as may to it seem best, yet it is for the courts to determine their validity. *Ib.*
8. **MUNICIPAL CORPORATIONS : RAILWAYS : REGULATION OF.** A city council, by granting to a railway company the privilege of constructing its road over its streets and squares, does not lose the right to subject the company to reasonable regulations, both in the conduct of its business, and in the location of its track over the places authorized by its ordinance. *Ib.*

MURDER.

See CRIMINAL LAW, 19.

HOMICIDE.

NEGLIGENCE.

1. **NEGLIGENCE: PLEADING.** A petition in an action by a passenger against a railroad for injuries resulting from its negligent management of its trains is sufficiently specific in its averments of the acts constituting the negligence, which charges that "the defendant, by and through its servants, agents and employes in charge of and managing said train, negligently and unskilfully ran and managed the same in such a way as to cause the said train and the car in which the said plaintiff was being conveyed as to check its speed very suddenly and to jolt and pitch the same suddenly and with great force backward and forward in such manner and with such force as to cast and throw said plaintiff out of said car and upon the platform and from said platform onto the track of said railroad, under the said cars and train, by means and by reason of which said cars and train ran upon and over the left arm and left leg of the plaintiff." *Coudy v. The St. L., I. M. & S. Ry. Co.*, 79.
2. **DEMURRER TO EVIDENCE: NEGLIGENCE.** The trial court in this case, did not err in overruling a demurrer to plaintiffs evidence, interposed by defendant on the grounds that the evidence showed that plaintiff was guilty of contributory negligence, and that such evidence as to the manner in which the accident occurred was irreconcilable with the physical facts attending it. *Ib.*
3. **CARRIER: PASSENGER, INJURY TO; BURDEN OF PROOF.** Where, in an action by a passenger against a railroad for an injury received in operating its train, the occurrence of the injury through the mistake of the carrier is shown, a presumption of negligence arises against the latter, which casts upon it the burden of showing that the accident happened notwithstanding the exercise on its part of the high degree of care which the law imposes on it. *Ib.*
4. **MASTER AND SERVANT: INCOMPETENCY OF LATTER: DRUNKENNESS.** Where an employe is injured by the negligent act of another servant, resulting from the latter's intoxication, and the employer knew of his intemperate habits, and the plaintiff did not, the employer is liable for the injury. *Maxwell v. The Hannibal & St. Joseph Ry. Co.*, 95.
5. ———: ———. It is immaterial to a recovery in such case whether the servant causing the injury was a fellow-servant of the one injured or his superior. *Ib.*
6. **NEGLIGENCE: RAILROAD: ESCAPE OF FIRE FROM ENGINE.** Proof of the fact of fire escaping from a passing engine and burning the property of another, makes a *prima facie* case of negligence against the railroad which provides and operates the engine. *Wise v. The Joplin Railroad Company*, 178.
7. **PLEADING: NEGLIGENCE.** The petition in such case need only aver the substantive facts that the fire was negligently permitted to escape and burn the plaintiff's property. Under such averments

- the plaintiff can show the negligence of the railroad in providing safe engines and also in operating them. *Ib.*
8. NEGLIGENCE: ESCAPE OF FIRE: INSTRUCTIONS: VARIANCE. The request of the defendant that the jury be instructed to find for it, if the fire escaped from the smoke stack, instead of the fire box or ash pan of the engine, *held*, properly refused, although the place of the escape of the fire was alleged in the petition to have been the ash pan and fire box. The evidence on the trial related to the locomotive engine, in providing and operating it, and whether the fire escaped from it through the ash pan or through the smoke stack was immaterial, unless the defendant was prejudiced by the supposed variance, which was not the case. *Ib.*
 9. NEGLIGENCE: PROXIMATE CAUSE. Negligence affords no ground for an action unless it is followed by an injury and is its proximate cause. *Stepp v. The Chicago, Rock Island & Pacific Railway Company*, 229.
 10. RAILROAD: RATE OF SPEED. While, in the absence of municipal regulations, no rate of speed of a railway train is negligence *per se*, still it does not follow that the railroad may at all times and places run its trains at any rate of speed. *Ib.*
 11. ———: ———: EVIDENCE. In an action for the death of a person occurring at a public crossing in the country, and charged to have resulted from the negligence of defendant in managing its train, the rate of speed of the latter is a proper matter to be taken into consideration in determining whether the defendant was guilty of negligence at the crossing, and this, too, is the case irrespective of any rules of defendant relating to the rate of speed at such crossing. *Ib.*
 12. ———: ———: DUTY OF TRAVELER. While it is negligence on the part of the railroad not to give the statutory signals at public crossings, it is, also, the duty of the traveler to use all reasonable care and caution to avoid injury. *Ib.*
 13. ———: ———: ———. It is the duty of one crossing a railroad track to look and listen for an approaching train, and thereby obtain all the information his eyes and ears will afford him, and if he fails to do so and thereby contributes to the injury, he must suffer the consequences, even though the railroad may have been derelict in the performance of its duty in giving the signals. *Ib.*
 14. NEGLIGENCE: ONUS PROBANDI. It devolves on the person alleging the default of the company to make proof of its negligence and that the injury was occasioned in consequence of such negligence, and, on the other hand, when the fault of the person injured, if any there was, is not disclosed by the plaintiff's evidence and the railroad is shown to have been in default, it then devolves on the latter to show the want of proper care by the person injured, and that by the exercise of proper precautions he would have escaped injury *Ib.*
 15. NEGLIGENCE: RAILROADS: CONTRACT: PASSENGER. By the terms of a written contract entered into between the Missouri Pacific Railway Company and the defendant, the passenger trains of the

latter were to be drawn over the road of the former between the town of Pacific, defendant's eastern terminus, and the city of St. Louis; the Missouri Pacific Company using its own locomotive and crew of same, and the defendant furnishing at its own expense all train men for the care and management of its trains, the manner of running the latter and the control and acts of said train men being subject to the rules and regulations of the Missouri Pacific Company while so running on its track. *Held*, there could be no recovery against defendant for the death of a passenger caused by the failure of the train to stop long enough for the deceased to alight at his destination and while the train was being operated between St. Louis and Pacific, the deceased having purchased his ticket from the Missouri Pacific Company, and for transportation between St. Louis and the town of Webster where the accident occurred. (Black and Norton, JJ., dissenting). *Smith v. The St. Louis & San Francisco Ry. Co.*, 418.

16. ——— : ———. Under the contract between the two companies, the train by which the deceased was killed cannot be regarded as defendant's train in such a sense as to make it liable for the accident. *Ib.*
17. RAILROAD : NEGLIGENCE. If the deceased was lawfully on defendant's train and it had been operated by servants under its control, the defendant would be liable for an injury occasioned by the negligence of such servants, and this, too, irrespective of the company from which the ticket was purchased. *Ib.*
18. RAILROAD : KILLING STOCK : ORDINANCE. Running a railroad train within the limits of a municipal corporation at a greater rate of speed than permitted by its ordinance, is negligence *per se*, and the road is liable for the killing of stock occasioned by reason of such illegal rate of speed. *Bowman v. The Chicago & Alton Railway Company*, 533.
19. NEGLIGENCE : SERVANT, INCOMPETENCY OF. Where a railroad has knowledge of the unfitness and incompetency of a conductor in charge of its train, and another servant, while engaged in the proper discharge of his duties as brakeman, is precipitated between two cars of the train and injured, by reason of such incompetency of the conductor and his carelessness in having drawn the pin coupling between said cars without notifying the brakeman, the company is liable for such injury. *Neilon v. The Kansas City, St. Joseph & Council Bluffs Railway Company*, 599.
20. NEGLIGENCE : RAILROAD CROSSING : FAILURE TO KEEP IN REPAIR. Where a railroad fails to keep its crossing over a public road in repair, and in consequence thereof, a team is stalled and struck by a passing train, it is liable for the injury. *Kimes v. The St. Louis, I. M. & S. Ry. Co.*, 611.
21. ——— : CONTRIBUTORY NEGLIGENCE. If the owner of the team negligently went upon the crossing, without looking or listening for the approach of trains, and might, by ordinary care, have seen or heard the train in time to have avoided the accident, the company would not be liable. *Ib.*

22. RAILROADS: ACTION BY WIFE FOR DEATH OF HUSBAND: CONTRIBUTORY NEGLIGENCE. In an action by plaintiff against a railroad company for the killing of her husband at one of its crossings, by the alleged negligence of the company, a recovery cannot be had where the evidence shows that the deceased was not seen by the engineer in time to stop the train before reaching the crossing, but that the danger signal was given when the deceased was within a few feet of the crossing, which signal he disregarded, and went onto the crossing, and was killed. And it makes no difference in such case that the train was running at a greater rate of speed than that fixed by an ordinance of the city in which the accident occurred. *Fox v. The Missouri Pacific Railway Company*, 679.

NEGOTIABLE INSTRUMENTS.

See **BILLS AND NOTES.**

NEW TRIAL.

1. NEW TRIAL: NEWLY DISCOVERED EVIDENCE. A party is not entitled to a new trial on the ground of newly discovered evidence, when such evidence was accessible to him before the trial. *Maxwell v. The H. & St. J. Ry. Co.*, 95.
2. ———: ———: INSTRUCTIONS: NEW TRIAL. It is no ground for a new trial that the instructions given by the court had been lost after trial. Where the instructions are not contained in the record it will be presumed that the action of the trial court in giving them was not erroneous. *Porth v. Gilbert*, 125.
3. NEW TRIAL: NEWLY DISCOVERED EVIDENCE. A motion for a new trial on the ground of newly discovered evidence, *held*, properly refused. *The Southern Express Co. v. Moeller*, 208.

NON-RESIDENTS.

ACTION FOR DEATH OF PERSON; NON-RESIDENT: REVISED STATUTES, SECTION 2121. *Philpott v. Mo. Pac. Ry. Co.*, 164.

NON-SUIT.

1. PRACTICE: ADMISSIONS: NON-SUIT. Where the answer admits the deed under which defendant claims, which deed contains an assumption of the payment of certain notes in suit, this is sufficient to make out a *prima facie* case for plaintiff, and should prevent the latter's being forced to a non-suit. *Fitzgerald v. Barker*, 13.
2. NON-SUIT. A non-suit, under Revised Statutes, section 3256, may be taken at any time before the jury retires, or before final submission to the court, and after the law is declared. *Wood v. Norman*, 298.
3. ———: NEW ACTION. A new action held to have been commenced within one year after a non-suit suffered. *Ib.*

NOTICE.

1. ——— : NOTICE : INNOCENT PURCHASER. A purchaser or mortgagee from an individual partner of real estate belonging to the firm will be protected, if he received the conveyance without notice of the equitable rights of the firm in the premises. *Priest v. Chouteau*, 398.
2. THE FINDING of the trial court that the mortgagee in this case was affected with such notice affirmed. *Ib.*

OFFICES AND OFFICERS.

1. SHERIFF, OFFICIAL ACTS OF : BOND. A sheriff, who, by consent of the parties in interest, receives payment of the purchase money of land sold under a judgment in partition, before the time the same is due and payable under the order of sale, will be deemed to have received it in his official capacity, and the sureties on his bond are liable for his default in paying it over to the persons entitled to it. *The State ex rel. Rice v. Cayce*, 456.
2. GUARDIAN OF MINOR, AUTHORITY OF. The consent of a guardian of a minor that the sheriff shall so receive the purchase money before the expiration of the time of credit named in the order of sale is binding on the ward. *Ib.*
3. PENALTY : SHERIFF : MONEY COLLECTED ON EXECUTION : STATUTE. The five per cent. penalty allowed against a sheriff and his sureties under Revised Statutes, sections 2403 and 3378, on money collected on execution, which the former has failed to pay over to the persons entitled to the same, does not begin to run until a demand has been made. The institution of a suit against the sheriff is a demand. *Ib.*
4. OFFICERS, FEES OF. No fees are allowed an officer, except where expressly given and allowed by law. *Williams v. Chariton County*, 645.
5. ——— : ASSESSOR : LISTING OF DOGS. Dogs are assessed in the list of personal property, and the assessor is allowed no increase in his emoluments for assessing them. *Ib.*

OWNERSHIP.

See CRIMINAL LAW, 23.

PARTIES.

1. ——— : PARTIES : WAIVER. Unless the objection as to the insufficiency of parties is made by demurrer or answer, it is waived. *Baier v. Berberich*, 50.
2. ——— : ——— : PARTIES. One who is neither a resident of the county nor of the judicial circuit, cannot be joined in a condemna-

tion proceeding. Such misjoinder, however, could only cause a dismissal as to him, and would not authorize the court to dismiss the whole proceeding. *The Missouri Pacific Ry. Co v. Carter*, 448.

3. PRACTICE: PARTIES: JUDGMENT. The Supreme Court may reverse a judgment as to some of the appellants, and affirm it as to others, R. S., secs. 3570, 3583, 3583. *Mansfield v. Allen*, 502.

PARTNERSHIP.

1. DEED OF ASSIGNMENT: PARTNERSHIP PROPERTY. The deed of assignment in this case held not invalid for the alleged reason that partnership property was assigned for the benefit of all the creditors and not for the benefit of firm creditors. *Hartzler v. Tootle*, 23.
2. PARTNERSHIP: DEBT: RELEASE: EVIDENCE. In an action against a member of a dissolved partnership for a debt of the partnership, where the defence is a release of the defendant by the creditor, and the acceptance of the new partnership as the debtor, pleadings and papers in an action of attachment against the new partnership by the creditor for his debt are admissible to show the intention to release. *Baum v. Fryrear*, 151.
3. PARTNERSHIP. Whether persons are partners as to each other may be determined by their intention, as the latter is expressed in the words of their contract, or may be gathered from the acts and circumstances attending such contract. *Priest v. Chouteau*, 398.
4. THE RULE applied and the relation of partnership held to exist between contracting parties. *Ib.*
5. PARTNERSHIP DEBTS: REAL ESTATE OF FIRM. Real estate owned as partnership property is bound for all the debts of the firm, and for all advances made by any of the partners as if it were personal property. *Ib.*
6. ———: ———. The accounts between the partners must be settled and all partnership debts must be paid before any creditor of an individual member of the firm can subject the firm property to the payment of this debt. And this rule applies where one partner mortgages his interest in the real estate of the firm to secure his individual debt. The interest thus mortgaged will remain subject to the prior lien for partnership debts. *Ib.*
7. ———: ———: INNOCENT PURCHASER. A purchaser or mortgagee from an individual partner of real estate belonging to the firm will be protected, if he received the conveyance without notice of the equitable rights of the firm in the premises. *Ib.*
8. THE FINDING of the trial court that the mortgagee in this case was affected with such notice affirmed. *Ib.*
9. PARTNERSHIP: FIRM DEBT: ACTION AGAINST FORMER PARTNER. It is

a good defence to an action by one against his former partner for the latter's share of a firm debt paid by the former, that the firm creditor was, on his part, indebted to plaintiff and defendant jointly, and that plaintiff, with knowledge of the existence of such indebtedness, and against defendant's consent, paid the firm creditor. *Cockrell v. Thompson*, 510.

10. ———: ———. It is, also, a good defence to such action that the firm indebtedness originated from partnership transactions between plaintiff and defendant, and at the commencement of plaintiff's action there remained unsettled of the partnership business other matters than the item of indebtedness paid by plaintiff. *Ib.*
11. ———: ———. It is no defence to such action that at the time plaintiff paid the firm debt the firm creditor was indebted to defendant individually, and that plaintiff knew of such fact, and, nevertheless, and against defendant's consent, paid the firm debt. *Ib.*

See FRAUD, 1.

PENALTY.

PENALTY: SHERIFF: MONEY COLLECTED ON EXECUTION: STATUTE. The five per cent. penalty allowed against a sheriff and his sureties under Revised Statutes, sections 2403 and 3378, on money collected on execution, which the former has failed to pay over to the persons entitled to the same, does not begin to run until a demand has been made. The institution of a suit against the sheriff is a demand. *The State ex rel. Rice v. Cayce*, 456.

PERSONAL PROPERTY.

PERSONAL PROPERTY, CONDITIONAL SALE OF. A sale and delivery of personal property prior to the going into effect of the act of March 15, 1877 (Laws, p. 320; R. S., sec. 2505), on condition that the title was to remain in the vendor until the purchase price was paid, did not pass the title to the vendee until the condition was complied with, and if the purchase price was not paid the vendor could recover possession of the property either of the vendee or of a purchaser from him, and recovery could be had of such purchaser, notwithstanding he was a *bona fide* one and without notice of the condition. *Kingsland-Ferguson Manufacturing Company v. Culp*, 548.

PHYSICIAN.

See WITNESS.

PLAT.

See EVIDENCE, 6.

PLEADING.

1. ———: **PLEADING: EQUITY.** A petition which alleges a fraudulent

combination, by which the defendants procured a sale of property under a deed of trust and became the purchasers, presents a case for equitable relief in favor of the owner of the equity of redemption. *Baier v. Berberich*, 50.

2. **NEGLIGENCE : PLEADING.** A petition in an action by a passenger against a railroad for injuries resulting from its negligent management of its train is sufficiently specific in its averments of the acts constituting the negligence, which charges that "the defendant, by and through its servants, agents and employes in charge of and managing said train, negligently and unskilfully ran and managed the same in such a way as to cause the said train and the car in which the said plaintiff was being conveyed as to check its speed very suddenly and to jolt and pitch the same suddenly and with great force backward and forward in such manner and with such force as to cast and throw said plaintiff out of said car and upon the platform and from said platform onto the track of said railroad, under the said cars and train, by means and by reason of which said cars and train ran upon and over the left arm and left leg of the plaintiff." *Coudy v. The St. Louis, I. M. & S. Ry. Co.*, 79.
3. **PLEADING : STATUTE.** A party desiring to avail himself of the provisions of a public act is only required to state the facts which bring his case clearly within it. *Reynolds v. The Chicago & Alton Railroad Company*, 90.
4. ——— : ———. In an action to recover the penalties for overcharges for transportation by a railroad company (R. S., §§ 833, 834, 835), the fact that the petition states the maximum rate to be less than that allowed by law, does not vitiate it. *Ib.*
5. **PLEADING : AMENDMENT : JUSTICE OF PEACE.** An amended statement cannot be filed in the circuit court on appeal from a justice's court when no statement was filed in the latter court. *Peddicord v. The Mo. Pac. Ry. Co.*, 160.
6. **PLEADING : MALICIOUS ATTACHMENT.** A petition in an action for suing out a malicious attachment must allege the want of probable cause for the attachment. *Moody v. Deutsch*, 237.
7. ——— : **WAIVER.** A plea in abatement is waived by one to the merits. *Ib.*
8. **NEGOTIABLE NOTE, ACTION ON : PLEADING.** A petition in an action against an indorser on a negotiable promissory note must state facts from which it may appear to the court that the note was a negotiable one. *Townsend v. The Charles H. Heer Dry Goods Company*, 503.

See NEGLIGENCE, 7.

PLEADING, CRIMINAL.

1. **CRIMINAL LAW : LARCENY OF DEED : INDICTMENT.** In an indictment under Revised Statutes, section 1312, for the larceny of a deed, the

same particularity of description is not necessary as in charging its forgery. If the statutory term is employed in designating the instrument charged to have been stolen, no more minute description is requisite than the common law requires in an indictment for the larceny of an ordinary chattel. It is sufficient to describe the instrument by any name by which the same may be usually known. R. S., sec. 1814. *The State v. Hall*, 669.

2. ———: ———: ———. An indictment for the larceny of a deed need not mention the name of the grantee in the deed. And the term "deed" imports a complete instrument. *Ib.*
3. ———: ———: ———: VALUE: OWNERSHIP. In an indictment under Revised Statutes, section 1312, for the larceny of a deed, it is not necessary to allege that it was of any value. And said section is broad enough to cover the larceny of deeds not delivered, and wills not probated. The indictment in such case may charge the property as either the bailee's or the bailor's, or as the thief's, or true owner's, at the election of him who draws it. *Ib.*

POLICE POWER.

See MUNICIPAL CORPORATIONS, 4.

PRACTICE, CIVIL.

1. PRACTICE: DUTY OF JURY. It is obligatory upon juries to find in favor of a party who is supported by a presumption of law, in the absence of opposing evidence. *Fitzgerald v. Barker*, 13.
2. ———: ADMISSIONS: NON-SUIT. Where the answer admits the deed under which defendant claims, which deed contains an assumption of the payment of certain notes in suit, this is sufficient to make out a *prima facie* case for plaintiff, and should prevent the latter's being forced to a non-suit. *Ib.*
3. ———: EVIDENCE: ADMISSION. Where in a suit upon notes, certain notes are offered in evidence without objection, this amounts to a tacit admission that they are the notes in suit. *Ib.*
4. ———: EVIDENCE: APPEAL. The specific error complained of as to the admission or exclusion of evidence, must be pointed out, or the objection will not be considered on appeal. *Baier v. Berberich*, 50.
5. ———: MOTION FOR NEW TRIAL. The defence that another action is pending between the same parties for the same cause of action cannot be made for the first time in the motion for new trial. *Ib.*
6. ———: PARTIES: WAIVER. Unless the objection as to the insufficiency of parties is made by demurrer or answer, it is waived. *Ib.*

7. ———: PLEADING: EQUITY. A petition which alleges a fraudulent combination by which the defendants procured a sale of property under a deed of trust, and became the purchasers, presents a case for equitable relief in favor of the owner of the equity of redemption. *Ib.*
8. ———: EVIDENCE: DEMURRER. There being evidence to establish both sides of an issue, whether much or little, the legal right to take the verdict of a jury upon it, cannot be denied. *Brewington v. Jenkins*, 57.
9. JURY, PROVINCE OF. It is for the jury and not for the court to pass on the credibility of witnesses; to determine the weight to be given to their testimony and to reconcile conflict therein. *Coudy v. The St. Louis, I. M. & S. Ry. Co.*, 79.
10. INSTRUCTIONS. Instructions are properly refused which assume the truth of material facts, or ignore material facts, or assert inapplicable abstract propositions of law. *Maxwell v. The Han. & St. J. Ry. Co.*, 95.
11. PRACTICE: OBJECTIONS TO EVIDENCE. Objections to the introduction of evidence should be made at the time it is offered and not be raised by instructions to the jury. *Ib.*
12. NEW TRIAL: NEWLY DISCOVERED EVIDENCE. A party is not entitled to a new trial on the ground of newly discovered evidence when such evidence was accessible to him before the trial. *Ib.*
13. PRACTICE: INSTRUCTIONS. An instruction, which is misleading or which ignores the only real matter in issue under the pleadings, is properly refused. *Greer v. Parker*, 107.
14. ———: ABSENCE OF CO-COUNSEL: DISCRETION OF TRIAL COURT. Where the evidence in a case is taken on the seventeenth and a continuance granted to the twenty-first, at the request of defendant's counsel, at which time the trial is concluded, this court will not interfere with the action of the trial court in overruling the motion for a new trial, based upon the ground of the unavoidable absence of one of defendant's counsel, when it appears that his senior counsel was present and able and competent to and did conduct the case. *Ib.*
15. ———: DEMURRER. Where there is any evidence at all to sustain an issue, a demurrer to the evidence should not be sustained. *Baum v. Fryrear*, 151.
16. ———: INSTRUCTIONS. It is not error to refuse an instruction embodied in one given. *Ib.*
17. ———. Objections to admission of evidence come too late when made for the first time in the motion for a new trial. *The State v. Peak*, 190.
18. ———: BILL OF EXCEPTIONS: FILING OF. Leave given to present

a bill of exceptions to the judge on or before a given date in vacation, which by agreement of parties is entered of record, clearly gives the right to file the bill within the given time. *Swank v. Swank*, 198.

19. **EQUITY PRACTICE.** Where a jury, empaneled to try an issue in an equity case, fails to agree, the court may refuse to call another jury, and may decide the case on the evidence it has already heard before the jury which disagreed. *Keithley v. Keithley*, 217.
20. ———. The court in an equity case is not bound to submit issues to a jury, or to accept as its own the finding of a jury. *Ib.*
21. ———. If, in a suit in equity, the complainant fails to make a case on the evidence, the chancellor may, at once and without hearing any evidence, on defendant's behalf dismiss the bill. *Leeper v. Bates*, 224.
22. **SEMBLE** that a demurrer to the evidence can be interposed to the plaintiff's evidence in an equity case as well as in an action at law. *Ib.*
23. **THE DEMURRER** to the evidence in this action, which was one to set aside a deed for being in fraud of creditors, *held*, improperly sustained, because under the pleadings and the evidence, the defendant should have been required to furnish some proof of the honesty and good faith of the conveyance to him. *Ib.*
24. **QUESTION FOR JURY.** Where there is any evidence tending to prove the allegations of the petition, the case should not be taken from the jury. *Moody v. Deutsch*, 237.
25. **MALICIOUS PROSECUTION, ACTION FOR: MALICE.** Malice is a necessary element in an action for malicious prosecution, and the sufficiency of the proof of such malice is a question for the jury. *Ib.*
26. ———: ———: **PROBABLE CAUSE.** What is probable cause for an attachment is a mixed question of law and fact. When the facts are undisputed, the court should declare their legal effect, but when they are disputed, the question is, under proper instructions, for the jury. *Ib.*
27. **DEMURRER TO EVIDENCE.** The rule is well settled as to a demurrer to the evidence that if there is any evidence tending to prove the issues of fact, the case must go the jury. *Groll v. Tower*, 249.
28. ———: **NEGLIGENCE.** Where plaintiff seeks to recover for the death of her husband, alleged to have resulted from a fall caused by the negligence of the defendant, his employer, in furnishing a defective platform, and the evidence fails to show the fall of the deceased, a demurrer thereto is properly sustained. *Ib.*
29. **MATERIAL AVERMENT, FAILURE OF PROOF OF.** Where there is failure of proof of a material averment in the petition, there can be no recovery. *Ib.*

80. PARTIES: WAIVER. Objections to parties are waived unless made by demurrer or answer. *Hicks v. Jackson*, 283.
81. THE CONVERSION of certain notes and securities held to be within the issues made by the pleadings in this case and the judgment for their value in favor of a defendant and against a co-defendant, affirmed, and this although the petition was one in ejectment. *Ib.*
82. NON-SUIT. A non-suit under Revised Statutes, section 3256, may be taken at any time before the jury retires, or before final submission to the court, and after the law is declared. *Wood v. Nortman*, 298.
83. ———: NEW ACTION. A new action held to have been commenced within one year after a non-suit suffered. *Ib.*
84. CONDEMNATION PROCEEDINGS: PRACTICE: EXCEPTIONS: TAKING POSSESSION OF LAND: PAYMENT OF MONEY INTO COURT: STRIKING OUT EXCEPTIONS: ORDERING MONEY PAID TO OWNER: APPEAL: SUPERSEDEAS: PARTY AGGRIEVED: DISMISSAL OF APPEAL. A railroad company has a right, under the statute, to condemn land, and when the report of the commissioner comes in, and the damages assessed are deemed excessive, to pay the amount assessed to the clerk, to take possession of the land desired, in order to construct its road, to file exceptions, to have them heard, and pending the hearing of exceptions, to have the money retained by the clerk: and if the court should strike out the exceptions, and order the assessment money paid to the land owner, such order will be a final one, from which the company can appeal with *supersedeas*, as an incident, just as in other civil causes, and the company, in such circumstances, is to be deemed "aggrieved" within the meaning of section 3710, Revised Statutes. *The St. Louis & San Francisco Ry. Co. v. Evans & Howland Fire Brick Co.*, 307.
85. PRACTICE: INSTRUCTIONS. It is not error to refuse instruction asked where the principles embodied in them are embraced in others given. *The State ex rel. Stanley v. The St. Louis Brokerage Co.*, 411.
86. ———: ———. An instruction asked is properly refused when there is no evidence upon which to base it. *Ib.*
87. REPLEVIN: PRIMA FACIE CASE. Where, in an action for the possession of personal property, the plaintiff makes proof of a chattel mortgage to him, valid on its face, the possession of the property by the mortgagee, the record of the mortgage and the maturity of the debt the mortgage was given to secure, he makes out a *prima facie* case, and it is error for the court to direct a verdict for the defendant. *Turner v. Langdon*, 438.
88. PRACTICE. QUESTION FOR JURY. Where, in such action, the evidence leaves it doubtful whether or not the mortgage was recorded before the execution under which defendant claims was levied, the question should be submitted to the jury. *Ib.*
89. CONVERSION: INADEQUATE DAMAGES: PRACTICE. The court should

set aside a verdict for the plaintiff in an action for the conversion of property when the damages assessed by the jury are manifestly inadequate, and where the trial court refuses to do so, the Supreme Court will interfere and reverse the judgment. *Watson v. Harmon*, 443.

40. INTEREST. Interest should be allowed on the value of property wrongfully converted, from the time of the conversion. *Ib.*
41. PRACTICE : AMENDMENT : STRIKING OUT NAME OF CO-PLAINTIFF. An amendment by striking out the name of a co-plaintiff does not change the original cause of action, and is permissible under Revised Statutes, section 3060. *Davis v. Ritchie*, 501.
42. APPEALS FROM JUSTICES, WHEN TRIABLE : PRACTICE : Where on an appeal to the circuit court from a justice of the peace the appellant fails to give notice of the appeal and the appellee enters his appearance on or before the second day of the term, the latter is not then entitled to a simple affirmance of the judgment. If he desires a determination of the cause at that term, he must offer evidence and try the case *de novo*. *Priest v. The Missouri Pacific Railway Company*, 521.
43. QUIT-CLAIM DEED : SUIT FOR PURCHASE PRICE OF LAND. Plaintiff bought land of the defendant Barton county, receiving a quit-claim deed therefor, which land defendant had previously sold to another. Plaintiff sold the land and it does not appear that his grantee was ever disturbed in his possession. *Held*, that plaintiff received what he bargained for, and cannot recover in a suit against the county for the purchase price. *Harkless v. Barton County*, 619.
44. ACTION FOR PERSONAL INJURIES : RIGHT TO COMPEL PLAINTIFF TO SUBMIT TO PERSONAL EXAMINATION. The right of the defendant in an action against him for personal injury, to have the plaintiff's injuries personally examined by physicians, so that the latter may testify as to their character and extent, is not an absolute one. It is a matter as to which the trial court has a discretion, which will not be interfered with, unless manifestly abused. *Shepard v. The Missouri Pacific Railway Company*, 629.

See NEGLIGENCE, 2.

RAILROADS, 31, 32.

WITNESSES, 3.

PRACTICE, CRIMINAL

1. PRACTICE, CRIMINAL : JUROR : CAUSE OF CHALLENGE. The expression of, or the existence of bias, or prejudice, against crime, constitutes no cause of challenge of a juror. *The State v. Burns*, 47.
2. — : — : — : WAIVER. A defendant who hears expressions of prejudice against himself by a juror, constituting any

ground of objection, and who fails to communicate them to his counsel, so that proper steps can be taken, is guilty of inexcusable negligence. *Ib.*

3. ———: CONTINUANCE. An application for continuance under Revised Statutes, section 1884, which states the facts defendant expects to prove by the absent witnesses, but fails to state that he is unable to prove them by any other witness whose testimony could be as easily procured, is fatally defective and should be denied. *The State v. Lett*, 52.
4. ———: EVIDENCE. Defendant in a criminal case cannot complain of an error in the admission of evidence in his own favor. *Ib.*
5. ———: ———. It is competent for the state in a criminal prosecution to offer evidence for the purpose of identifying the instrument with which the crime was committed, and, failing in this, to withdraw the evidence, in a case where it is immaterial and not prejudicial to the defendant. *Ib.*
6. ———: INSTRUCTION. It is proper to instruct the jury that if a witness wilfully swears falsely to any material fact in the case, they may disregard his entire testimony, but this rule cannot be applied to a case of mere mistake on the part of the witness. *Ib.*
7. ———: CONTINUANCE. It is not error to deny an application for continuance where it shows the exercise of no diligence on the part of defendant in preparing for trial. *The State v. Wilson*, 134.
8. ———: ———. An application for continuance, based upon the ground of the absence of material witnesses, which fails to comply with the requirements of the statute (R. S., sec. 1884), by setting forth the probability of procuring the testimony of such witnesses and the time within which it may be done, is defective and properly denied. *Ib.*
9. ———: ———: DISCRETION OF COURT. Granting and refusing applications for continuance are matters always resting largely in the discretion of the trial court, and unless it clearly appears that such discretion has been unsoundly exercised the Supreme Court will not interfere. *Ib.*
10. ———: JUROR, QUALIFICATION OF. One who has formed or expressed an opinion of the guilt or innocence of the accused from rumor or newspaper reports is not thereby disqualified from serving as a juror on the trial of the cause. Distinguishing *State v. Culler*, 82 Mo. 623. *Ib.*
11. ———: ———. One who had formed an opinion from rumor and newspaper reports, and who said on his *voir dire* that he "would naturally suppose defendant guilty," does not thereby give evidence of bias or prejudice against defendant, and is not disqualified for that reason to sit as a juror in the trial of the cause. *Ib.*

12. ——— : MURDER : INSTRUCTIONS FOR LOWER GRADE OF HOMICIDE. In a prosecution for murder, where the instructions given on behalf of defendant, based upon his own testimony, allow a finding for a grade of homicide less than murder, it is reversible error to fail to define such lower grade of crime of which defendant might, under the evidence, be convicted. *Ib.*
13. CRIMINAL LAW : PRACTICE : INSTRUCTIONS. Upon appeal from a conviction of murder in the second degree an error in an instruction for murder in the first degree is immaterial, and such instruction will not be reviewed by the Supreme Court. *The State v. Kelly*, 143.
14. ——— : INSTRUCTIONS. It is not error to refuse an instruction embodied in others given. *Ib.*
15. ——— : WITHDRAWING EVIDENCE BY INSTRUCTION. Where a specific objection to improper evidence is overruled, and it goes to the jury with the sanction of the court, the error will not be cured by withdrawing it by instruction, if it is of such character as to prejudice defendant's case. *The State v. Fredericks*, 145.
16. CRIMINAL PRACTICE : MISCONDUCT OF JURORS. Affidavits of jurors will not be received to show their own misconduct, nor will evidence of their declarations, made after the trial to third persons, be received for such purpose. *The State v. Cooper*, 256.
17. PRACTICE, CRIMINAL : GENERAL VERDICT. A general verdict upon an indictment containing three counts, charging the same offence in different forms, is sufficient. *The State v. McDonald*, 539.
18. ——— : EXCEPTIONS. The practice in criminal cases in regard to matters of mere exception is the same as in civil cases. Where defendant saves no exceptions during the progress of the trial, only the record proper will be reviewed upon appeal. *Ib.*
19. ——— : PRACTICE : BURDEN OF PROOF. When, in a prosecution for libel, the publication of the libelous matter is proved by the state, the burden is then on the defendant to justify the publication. *The State v. Hosmer*, 553.

PRACTICE IN SUPREME COURT.

1. INSTRUCTIONS : REVERSAL. The judgment of the St. Louis court of appeals, reversing that of the circuit court, affirmed, because of the action of the latter court in giving an instruction not authorized by the evidence. *Skyles v. Bollman*, 35.
2. PRACTICE : EVIDENCE : APPEAL. The specific error complained of as to the admission or exclusion of evidence must be pointed out or the objection will not be considered on appeal. *Baier v. Berberich*, 50.
3. ——— : ——— : OBJECTION. The Supreme Court will not pass upon

the admissibility of evidence where the record shows that it was received without objection. *The State v. Lett*, 52.

4. ———: ABSENCE OF CO-COUNSEL: DISCRETION OF TRIAL COURT. Where the evidence in a case is taken on the seventeenth and a continuance granted to the twenty-first, at the request of defendant's counsel, at which time the trial is concluded, this court will not interfere with the action of the trial court in overruling the motion for a new trial, based upon the ground of the unavoidable absence of one of defendant's counsel, when it appears that his senior counsel was present and able and competent to and did conduct the case. *Greer v. Parker*, 107.
5. PRACTICE IN SUPREME COURT: PRESUMPTION. In the absence of evidence in the record to the contrary, it will be presumed that the acts and rulings of the trial court were correct. *Porth v. Gilbert*, 125.
6. ———: ———: INSTRUCTIONS: NEW TRIAL. It is no ground for a new trial that the instructions given by the court had been lost after trial. Where the instructions are not contained in the record, it will be presumed that the action of the trial court in giving them was not erroneous. *Ib.*
7. ———: WEIGHT OF EVIDENCE. The Supreme Court will not weigh the evidence and disturb the verdict of a jury, or a court sitting as a jury, unless there is no evidence at all upon which to base it. *Baum v. Fryrear*, 151.
8. ———. The Supreme Court will not reverse a cause so that the plaintiff may widen his petition to conform with the proofs admitted in the case, and compel the lower court to try the identical issue again. Nor will it do so to afford a party a benefit and an advantage he has already received. *Wise v. The Joplin Railroad Company*, 178.
9. ———: DISMISSAL OF APPEAL. Where the record fails to show that an appeal was allowed, the cause will be stricken from the docket of the Supreme Court. *Swank v. Swank*, 198.
10. ———: EVIDENCE: IMMATERIAL ERROR. Although the testimony of the surviving party to a cause of action was improperly admitted in evidence, yet the Supreme Court will not, for that reason, reverse the judgment where the matters of such testimony were testified to by other witnesses, and were not contradicted. *Julian v. Calkins*, 202.
11. ———. Objections to evidence will not be reviewed in the Supreme Court, unless the evidence itself is preserved in the bill of exceptions. *Wood v. Nortman*, 298.
12. ———: WEIGHT OF EVIDENCE. Where, in an action at law, the evidence will justify a finding either way, the Supreme Court will not pass upon its weight. *The State to the use of Stanley v. The St. Louis Brokerage Co.*, 411.

13. CONVERSION : INADEQUATE DAMAGES : PRACTICE. The court should set aside a verdict for the plaintiff in an action for the conversion of property when the damages assessed by the jury are manifestly inadequate, and where the trial court refuses to do so, the Supreme Court will interfere and reverse the judgment. *Watson v. Harmon*, 443.
14. ——— : PARTIES : JUDGMENT. The Supreme Court may reverse a judgment as to some of the appellants, and affirm it as to others. R. S., secs. 3570, 3582, 3583. *Mansfield v. Allen*, 502.
15. ———. Where a cause is tried upon a theory adopted by both parties at the trial, the judgment will not be reversed on the ground that such theory was erroneous. *Bettes v. Magoon*, 580.
16. ——— : ASSIGNMENT OF JUDGMENT : SUBSTITUTION. Where one in his lifetime assigns a judgment in his favor and dies pending an appeal to the Supreme Court, the assignee will be substituted as a party in his stead in the latter court. R. S., sec. 3671. *Neilon v. The K. C., St. J. & C. B. Ry. Co.*, 599.
17. INTEREST : REMITTITUR : PRACTICE IN SUPREME COURT. Interest is not recoverable in an action for negligent injury to property. The error of the lower court, however, in authorizing the recovery of interest, may be cured by a remittitur in the Supreme Court. *Kimes v. The St. L., I. M. & S. Ry. Co.*, 611.

PRESUMPTIONS.

1. ORDINARY COURSE OF BUSINESS : PRESUMPTION. Where a deed of trust, made to secure the payment of certain notes, was executed prior to the execution of a deed to defendant, in which is assumed the payment of the notes, it will be presumed that the ordinary course of business was pursued, and that the notes had been executed and delivered when defendant assumed their payment. *Fitzgerald v. Barker*, 13.
2. PRESUMPTION : BURDEN OF PROOF. Every presumption attends the acts and doings of a court of general jurisdiction, and a party who asserts that error has been committed, must prove it. *The State v. Burns*, 47.
3. TRANSPORTATION : WEIGHT OF CARS : PRESUMPTION. In transportation by railroads, it will be presumed, in the absence of evidence to the contrary, that the cars were of regulation weight. *Reynolds v. The Chicago & Alton Railroad Co.*, 90.
4. PRACTICE IN SUPREME COURT : PRESUMPTION. In the absence of evidence in the record to the contrary, it will be presumed that the acts and rulings of the trial court were correct. *Porth v. Gilbert*, 125.
5. ——— : ——— : INSTRUCTIONS : NEW TRIAL. It is no ground for a new trial that the instructions given by the court had been lost after trial. Where the instructions are not contained in the record,

it will be presumed that the action of the trial court in giving them was not erroneous. *Ib.*

6. DEED, DELIVERY OF : ACCEPTANCE : PRESUMPTION. When a deed to a minor from its father is absolute in form, and for its benefit, and the grantor voluntarily causes it to be recorded, acceptance by the grantee, will be presumed, and such facts constitute a *prima facie* delivery of the deed, and raise a presumption, which it will require clear proof to overthrow, that the grantor intended to part with his title. *Tobin v. Bass*, 654.
7. THE EVIDENCE in this case held not sufficient to rebut such presumption, *Ib.*

MINORITY : LAWS OF ANOTHER STATE : PRESUMPTION. *Philpott v. The Missouri Pacific Ry. Co.*, 164.

PRINCIPAL AND ACCESSORY.

— : PRINCIPAL AND ACCESSORY : STATUTE. All distinction between principal and accessory before the fact has been abolished by Revised Statutes, section 1649. *The State v. Fredericks*, 145.

PRINCIPAL AND AGENT.

See ATTORNEY.

PROBATE COURT.

1. PROBATE COURT : INSANE PERSON : SETTING ASIDE JUDGMENT. A probate court can, at a subsequent term, set aside its judgment adjudging a person insane and appointing a guardian for him. *In the Matter of Marquis*, 615.
2. — : — : —. It is sufficient ground for setting aside such judgment that it does not appear from the record that the alleged insane person was notified of the proceeding against him, and if not notified, the reason therefor. *Ib.*

PROHIBITION.

PROHIBITION. A writ of prohibition denied in this case, the object of which was to prohibit a circuit judge from further proceeding in a *habeas corpus* matter pending before him. *The State ex rel. Spickerman v. Fox*, 61.

RAILROADS.

1. TOWNSHIP RAILROAD AID ACT : CONSTITUTION. The fifth section of the act of 1868, to facilitate the construction of railroads (Laws 1868, p. 93), being unconstitutional and void (*Webb v. Lafayette County*, 67 Mo. 353), could furnish no valid authority to a township which had subscribed to a railroad to retain the taxes collected from such railroad, and they were properly paid into the state

treasury, and, being so paid, the general assembly could not refund them to the township. *The State ex rel. Prairie Township v. Walker*, 41.

2. **NEGLIGENCE : PLEADING.** A petition in an action by a passenger against a railroad for injuries resulting from its negligent management of its train is sufficiently specific in its averments of the acts constituting the negligence, which charges that "the defendant, by and through its servants, agents and employes in charge of and managing said train, negligently and unskillfully ran and managed the same in such a way as to cause the said train and the car in which the said plaintiff was being conveyed to check its speed very suddenly and to jolt and pitch the same suddenly and with great force backward and forward in such manner and with such force as to cast and throw said plaintiff out of said car and upon the platform and from said platform onto the track of said railroad, under the said cars and train, by means and by reason of which said cars and train ran upon and over the left arm and left leg of the plaintiff." *Coudy v. St. Louis, I. M. & S. Ry. Co.*, 79.
3. **DEMURRER TO EVIDENCE : NEGLIGENCE.** The trial court in this case did not err in overruling a demurrer to plaintiff's evidence interposed by defendant on the grounds that the evidence showed that plaintiff was guilty of contributory negligence, and that such evidence as to the manner in which the accident occurred was irreconcilable with the physical facts attending it. *Ib.*
4. **CARRIER : PASSENGER, INJURY TO : BURDEN OF PROOF.** Where in an action by a passenger against a railroad for an injury received in operating its train, the occurrence of the injury through the mistake of the carrier is shown, a presumption of negligence arises against the latter, which casts upon it the burden of showing that the accident happened, notwithstanding the exercise on its part of the high degree of care which the law imposes on it. *Ib.*
5. **RAILROADS : EMBANKMENT : OBSTRUCTION OF SURFACE WATER : DAMAGES.** Where a railroad company condemns land for its right of way by proper methods, and without negligence, unskillfulness, or mismanagement, constructs its road, and the embankment therefor, obstructing no natural channel of water thereby, the injuries done by such embankment, by causing water to flow over the land of adjoining proprietors, will be regarded as the natural incidents and consequences of that which the corporation, by reason of condemning the land, had acquired the lawful right to do. For such injuries no action will lie, damages for them being assumed to be included in those already assessed. *Moss v. The St. Louis, Iron Mountain & Southern Railway Company*, 86.
6. **RAILROAD, RIGHT TO CHANGE ROAD BED.** The right of a railway company, after having constructed its road bed, to make such changes in it as experience may designate as proper, is, of necessity, a continuous one. *Ib.*
7. ——— : ———. In an action to recover the penalties for overcharges for transportation by a railroad company (R. S., secs. 833, 834, 835), the fact that the petition states the maximum rate to be less than that allowed by law does not vitiate it. *Reynolds v. The Chicago & Alton Ry. Co.*, 90.

8. **TRANSPORTATION : WEIGHT OF CARS : PRESUMPTION.** In transportation by railroads, it will be presumed, in the absence of evidence to the contrary, that the cars were of regulation weight. *Ib.*
9. **RAILROADS : TRANSPORTATION : OVERCHARGES : CONTRACT.** In an action against a railroad company to recover the penalties for overcharges for transportation, where there was a special contract between the shipper and the company for legal rates, the plaintiff is not remitted to an action for breach of the contract, and such contract constitutes no defence. *Ib.*
10. **RAILROAD : DOUBLE DAMAGE ACT.** Where in an action against a railroad under the double damage law (R. S. sec. 809) for the value of a bull killed by its train, the evidence shows that the bull was in a pasture which did not adjoin the railroad, and escaped therefrom into the pasture of one S., and thence onto the railroad track, there can be no recovery without proof also, that the fence through which the bull escaped into the pasture of S., was a lawful fence. *Peddicord v. The Mo. Pac. Ry. Co.*, 160.
11. **ACTION FOR DEATH OF A PERSON : NON-RESIDENTS : REVISED STATUTES, SECTION 2121.** The right of action given by Revised Statutes, section 2121, for the death of a person occurring in this state by reason of the negligent act of a railroad, is not limited to residents of this state. *Philpott v. The Missouri Pacific Ry. Co.*, 164.
12. ——— : **MINORITY : LAWS OF ANOTHER STATE : PRESUMPTION.** Where in such action brought here by a husband and wife, residents of the state of Texas, for the death of their minor son, who was also a resident of Texas, the laws of this state, and not of Texas, will determine the question of the minority of the son. Besides, in the absence of any evidence to the contrary, it will be presumed that the age of majority is the same in Texas as it is here. *Ib.*
13. ——— : **EMANCIPATION OF SON.** Section 2121, of Revised Statutes, is both penal and compensatory, and the emancipation of a minor son by his parents is no defence to an action thereon by them for his death. *Ib.*
14. **NEGLIGENCE : RAILROAD : ESCAPE OF FIRE FROM ENGINE.** Proof of the fact of fire escaping from a passing engine and burning the property of another, makes a *prima facie* case of negligence against the railroad which provides and operates the engine. *Wise v. The Joplin Ry. Co.*, 178.
15. **PLEADING : NEGLIGENCE.** The petition in such case need only aver the substantive facts that the fire was negligently permitted to escape and burn the plaintiff's property. Under such averments the plaintiff can show the negligence of the railroad in providing safe engines, and also in operating them. *Ib.*
16. **NEGLIGENCE : ESCAPE OF FIRE : INSTRUCTIONS : VARIANCE.** The request of the defendant that the jury be instructed to find for it, if the fire escaped from the smoke-stack, instead of the fire box, or ash pan of the engine, *held*, properly refused, although the place of the escape of the fire was alleged in the petition to have been the ash pan and fire box. The evidence on the trial related to the loco-

motive engine, in providing and operating it, and whether the fire escaped from it through the ash pan, or through the smoke stack. was immaterial, unless the defendant was prejudiced by the supposed variance, which was not the case. *Ib.*

17. NEGLIGENCE : PROXIMATE CAUSE. Negligence affords no ground for an action unless it is followed by an injury, and is its proximate cause. *Stepp v. The Chicago, Rock Island & Pacific Railroad Co.*, 229.
18. RAILROAD : RATE OF SPEED. While, in the absence of municipal regulations, no rate of speed of a railway train is negligence *per se*, still it does not follow that the railroad may at all times and places run its trains at any rate of speed. *Ib.*
19. ——— : ——— : EVIDENCE. In an action for the death of a person occurring at a public crossing in the country, and charged to have resulted from the negligence of defendant in managing its train, the rate of speed of the latter is a proper matter to be taken into consideration in determining whether the defendant was guilty of negligence at the crossing, and this, too, is the case irrespective of any rules of defendant relating to the rate of speed at such crossing. *Ib.*
20. PUBLIC CROSSINGS : RAILROADS : RATE OF SPEED. There must be a reasonable and fair regard on the part of railroads for persons and property in running their trains through villages and over frequented public crossings, and the rate of speed must be made to conform reasonably with the surroundings. *Ib.*
21. ——— : ——— : DUTY OF TRAVELER. While it is negligence on the part of the railroad not to give the statutory signals at public crossings, it is, also, the duty of the traveler to use all reasonable care and caution to avoid injury. *Ib.*
22. ——— : ——— : ———. Such traveler has a right to believe the signals will be given, and, on the other hand, the company has the right to act upon the supposition that he will take all reasonable care to hear them and give heed to their warning. *Ib.*
23. ——— : ——— : ———. It is the duty of one crossing a railroad track to look and listen for an approaching train and thereby obtain all the information his eyes and ears will afford him, and if he fails to do so and thereby contributes to the injury, he must suffer the consequences, even though the railroad may have been derelict in the performance of its duty in giving the signals. *Ib.*
24. ——— : ——— : ———. If the crossing is obstructed from view increased caution is required on the part of the traveler as well as on the part of the railroad, and if from noise, such as a gale of wind or the rattling of a wagon, hearing is rendered difficult, it then becomes the duty of the traveler to stop and listen. *Ib.*
25. NEGLIGENCE : ONUS PROBANDI. It devolves on the person alleging the default of the company to make proof of its negligence and

that the injury was occasioned in consequence of such negligence, and on the other hand when the fault of the person injured, if any there was, is not disclosed by the plaintiff's evidence and the railroad is shown to have been in default, it then devolves on the latter to show the want of proper care by the person injured, and that by the exercise of proper precautions he would have escaped injury. *Ib.*

26. ——— : ———. Direct evidence of the want of exercise of due care on the part of the person injured is not required to be produced. Surrounding circumstances may afford as conclusive proof as such direct evidence. *Ib.*
27. ——— : RAILROADS : CONTRACT : PASSENGER. By the terms of a written contract entered into between the Missouri Pacific Railway Company and the defendant, the passenger trains of the latter were to be drawn over the road of the former between the town of Pacific, defendant's eastern terminus, and the city of St. Louis; the Missouri Pacific Company using its own locomotive and crew of same, and the defendant furnishing at its own expense all train men for the care and management of its trains, the manner of running the latter and the control and acts of said train men being subject to the rules and regulations of the Missouri Pacific Company while so running on its track. *Held*, there could be no recovery against defendant for the death of a passenger caused by the failure of the train to stop long enough for the deceased to alight at his destination and while the train was being operated between St. Louis and Pacific, the deceased, having purchased his ticket from the Missouri Pacific Company, and for transportation between St. Louis and the town of Webster, where the accident occurred. (Black and Norton, J.J., dissenting). *Smith v. The St. Louis & San Francisco Railway Company*, 418.
28. ——— : ———. Under the contract between the two companies, the train by which the deceased was killed cannot be regarded as defendant's train in such a sense as to make it liable for the accident. *Ib.*
29. RAILROAD : NEGLIGENCE. If the deceased was lawfully on defendant's train and it had been operated by servants under its control, the defendant would be liable for an injury occasioned by the negligence of such servants, and this, too, irrespective of the company from which the ticket was purchased. *Ib.*
30. ——— : CONDEMNATION OF LAND. Proceedings to condemn land for railroad purposes must be brought in the county where the land lies. *The Missouri Pac. Ry. Co. v. Carter*, 448.
31. ——— : ——— : PARTIES. One who is neither a resident of the county nor of the judicial circuit, cannot be joined in the proceeding. Such misjoinder, however, could only cause a dismissal as to him, and would not authorize the court to dismiss the whole proceeding. *Ib.*
32. ——— : ——— : MINORS. The land of minors cannot be condemned for railroad purposes without making their guardians defendants

in the condemnation proceeding. In case they have no regular guardian, guardians *ad litem* should be appointed. *Ib.*

33. ——— : COMMISSIONER'S REPORT. The report of the commissioners is insufficient if it fail to contain a specific description of the property for which damages are assessed. *Ib.*
34. ——— : KILLING STOCK : ORDINANCE. Running a railroad train within the limits of a municipal corporation at a greater rate of speed than permitted by its ordinance, is negligence *per se*, and the road is liable for the killing of stock occasioned by reason of such illegal rate of speed. *Bowman v. The Chicago & Alton Railroad Co.*, 533.
35. ——— : ——— : ———. The railroad would still be liable in such case, although the stock was running at large in violation of the city ordinance, provided it had escaped from the owner's inclosure without his knowledge or consent, and the defendant, by the exercise of ordinary care and prudence, could have stopped the train so as to prevent the killing. *Ib.*
36. CONSTITUTION : RAILROAD TAX : STATUTE. Section 32, page 27, Revised Statutes, 1855 (R. S., 1865, chap. 63, sec. 19), which provided that : "If any of the taxpayers in any county or city in which a railroad tax shall be levied, shall have subscribed in good faith to the capital stock of any railroad to which the county shall have subscribed, the said taxpayers shall be entitled to a deduction on the amount assessed against them respectively, in proportion to the amounts of their *bona fide* subscriptions, until the amount of such credits or deductions shall equal the amount of their subscriptions, after which they shall be subject to pay their railroad tax as other persons," was repugnant to the provisions of the constitution of 1865, and hence invalid under that instrument. *Cock v. Stewart*, 575.
37. NEGLIGENCE. The servant of a railway company may rely on the vice-principal's promise to protect him while at work on a side-track, notwithstanding the existence of a rule of the company requiring servants to protect themselves by putting out flags while engaged in such work. *Moore v. The Wabash, St. Louis & Pacific Railway Company*, 588.
38. ——— : SERVANT, INCOMPETENCY OF. Where a railroad has knowledge of the unfitness and incompetency of a conductor in charge of its train, and another servant, while engaged in the proper discharge of his duties as brakeman, is precipitated between two cars of the train and injured, by reason of such incompetency of the conductor and his carelessness in having drawn the pin coupling between said cars without notifying the brakeman, the company is liable for such injury. *Neilon v. The Kansas City, St. Joseph & Council Bluffs Railway Company*, 599.
39. ——— : RAILROAD CROSSING : FAILURE TO KEEP IN REPAIR. Where a railroad fails to keep its crossing over a public road in repair, and in consequence thereof, a team is stalled and struck by a passing train, it is liable for the injury. *Kimes v. The St. L., I. M. & S. Ry. Co.*, 611.

40. ———: CONTRIBUTORY NEGLIGENCE. If the owner of the team negligently went upon the crossing, without looking or listening for the approach of trains, and might, by ordinary care, have seen or heard the train in time to have avoided the accident, the company would not be liable. *Ib.*
41. MUNICIPAL CORPORATIONS: RAILWAYS: REGULATION OF. A city council, by granting to a railway company the privilege of constructing its road over its streets and squares, does not lose the right to subject the company to reasonable regulations, both in the conduct of its business, and in the location of its track over the places authorized by its ordinance. *The Springfield Ry. Co. v. The City of Springfield*, 674.
42. RAILROADS: ACTION BY WIFE FOR DEATH OF HUSBAND: CONTRIBUTORY NEGLIGENCE. In an action by plaintiff against a railroad company for the killing of her husband at one of its crossings, by the alleged negligence of the company, a recovery cannot be had where the evidence shows that the deceased was not seen by the engineer in time to stop the train before reaching the crossing, but that the danger signal was given when the deceased was within a few feet of the crossing, which signal he disregarded, and went onto the crossing, and was killed. And it makes no difference in such case that the train was running at a greater rate of speed than that fixed by an ordinance of the city in which the accident occurred. *Fox v. The Missouri Pacific Railway Company*, 679.

RELEASE.

See PARTNERSHIP, 2.

REMITTITUR.

INTEREST: REMITTITUR: PRACTICE IN SUPREME COURT. Interest is not recoverable in an action for negligent injury to property. The error of the lower court, however, in authorizing the recovery of interest, may be cured by a *remittitur* in the Supreme Court. *Kimes v. St. Louis, Iron Mountain & Southern Ry. Co.*, 611.

REPLEVIN.

1. REPLEVIN: PRIMA FACIE CASE. Where, in an action for the possession of personal property, the plaintiff makes proof of a chattel mortgage to him, valid on its face, the possession of the property by the mortgagee, the record of the mortgage and the maturity of the debt the mortgage was given to secure, he makes out a *prima facie* case, and it is error for the court to direct a verdict for the defendant. *Turner v. Langdon*, 438.
2. PRACTICE: QUESTION FOR JURY. Where, in such action, the evidence leaves it doubtful whether or not the mortgage was recorded before the execution under which defendant claims was levied, the question should be submitted to the jury. *Ib.*

RES GESTÆ.

See CRIMINAL LAW, 3.

ROADS.

ROADS, CONSTRUCTION OF: ROAD AND CANAL FUND. A contractor for the construction of public roads could be paid under Revised Statutes, 1855, only out of the road and canal fund. *Moody v. Cass County*, 477.

See CONSTITUTIONAL LAW, 18.

ROAD AND CANAL FUND.

See ROADS.

ST. LOUIS CITY.

1. POLL BOOKS, ETC., INSPECTION OF: CITY OF ST. LOUIS. One whose object is to vindicate some public or private right is entitled to inspect the registration lists, poll books, and lists in the custody of the recorder of voters of the city of St. Louis and used at an election in said city. *The State ex rel. Thomas v. Hoblitzelle*, 620.
2. MANDAMUS. Mandamus will lie to compel the recorder of voters to grant such inspection. *Ib.*

ST. LOUIS COMMON FIELD LOTS.

See LAND AND LAND TITLES.

ST. LOUIS COURT OF APPEALS.

See TRANSFER OF CAUSES.

SALES.

1. EXECUTION SALE: SETTING ASIDE OF. Where, on inquiry at the office of the sheriff by the attorney of a defendant in an execution, he is informed by a deputy in charge of the office, that the sale of the property levied on consisting of three hundred and thirty-three shares of stock in a corporation, will take place at twelve o'clock on the day of sale, and subsequently the sale is made in mass at ten o'clock, in the absence of the defendant or his attorney, and without their knowledge and at a great sacrifice of the value of the property, such sale will be set aside, on timely application, on motion of defendant. *The American Wine Company v. Scholer*, 496.
2. ———. A court has power over its own process and can set aside an execution sale, on motion, certainly, at or before the return term of the writ. *Ib.*
3. PERSONAL PROPERTY, CONDITIONAL SALE OF. A sale and delivery of personal property prior to the going into effect of the act of March 15, 1877 (Laws, p. 320; R. S., sec. 2505), on condition that the title was to remain in the vendor until the purchase price was paid,

did not pass the title to the vendee until the condition was complied with, and if the purchase price was not paid the vendor could recover possession of the property either of the vendee or of a purchaser from him, and recovery could be had of such purchaser notwithstanding he was a *bona fide* one and without notice of the condition. *Kingsland-Ferguson Manufacturing Company v. Culp*, 548.

See TAXES, 4, 5, 14, 15.

SCHOOLS.

1. SCHOOL BUILDING, EXEMPTION FROM TAXATION. A school building exempted from taxation "so long as it is used only for the purposes of education" is not made taxable by the renting of a room therein for other purposes, where the proceeds thereof are used exclusively for the benefit of the school. *The North St. Louis Gymnastic Society v. Hudson*, 32.
2. SCHOOL DISTRICTS: CHANGE OF BOUNDARIES: COUNTY COMMISSIONER: A county school commissioner, when deciding as to the change of boundaries of school districts, referred to him under Revised Statutes, section 7023, cannot change such boundaries otherwise than as proposed in the election held under the statute. He must confine himself to the question whether the change proposed in said election shall, or shall not be made. *The State ex rel. School District No. 6 v. Riley*, 156.
3. MANDAMUS. Mandamus will lie to compel the county clerk to assess the school taxes of a district on the taxable property therein, according to its legal limits. *Ib.*
4. PUBLIC SCHOOLS: RULES: TEACHER. A public school teacher, by the very nature of his employment, has the right to make needful rules for the government of the school, where the directors fail to do so, as authorized by the statute. *R. S.*, sec. 7045. *Deskins v. Gose*, 485.
5. ———: ———: ———. A rule forbidding scholars from quarreling and using profane language on their way home is reasonable and needful, and the teacher can punish them for its infraction. *Ib.*

SCHOOL BUILDING.

See SCHOOLS.

SCHOOL DISTRICTS.

See SCHOOLS, 2.

SELF-DEFENCE.

See CRIMINAL LAW, 10, 19.

SHERIFF.

1. SHERIFF, OFFICIAL ACTS OF: BOND. A sheriff, who, by consent of the parties in interest, receives payment of the purchase money of land sold under a judgment in partition, before the time the same is due and payable under the order of sale, will be deemed to have received it in his official capacity, and the sureties on his bond are liable for his default in paying it over to the persons entitled to it. *The State ex rel. Rice v. Cayce*, 456.
2. GUARDIAN OF MINOR, AUTHORITY OF. The consent of a guardian of a minor that the sheriff shall so receive the purchase money before the expiration of the time of credit named in the order of sale is binding on the ward. *Ib.*
3. PENALTY: SHERIFF: MONEY COLLECTED ON EXECUTION: STATUTE. The five per cent. penalty allowed against a sheriff and his sureties under Revised Statutes, sections 2403 and 3378, on money collected on execution, which the former has failed to pay over to the persons entitled to the same, does not begin to run until a demand has been made. *Ib.*
4. THE INSTITUTION of a suit against the sheriff is a demand. *Ib.*

SHERIFF'S DEED.

1. SHERIFF'S DEED, AMENDMENT OF. Where a sheriff's deed is defective, as in failing to state the date and amount of judgment, he has the right to make another deed, and can do so after the expiration of his term of office. *Bush v. White*, 339.
2. ———: TITLE CONFERRED BY RELATION. A sheriff's deed relates back to the date of the judgment lien and operates to transfer the title of the judgment debtor as of that date, and the same is true of his amended deed. *Ib.*
3. SHERIFF'S DEED: RECITAL AS TO PLACE OF SALE. A recital in a sheriff's deed that he made the sale at the court house, will be construed as meaning, especially after the lapse of a long time, that it was conducted at the lawful and customary place of making sales. *Ib.*

See DEEDS, 10, 11.

SIGNIFICATION OF TERMS.

- "GENERAL LAW." See *Ewing v. Hoblitzelle*, 64.
- "SPECIAL LAW.." *Ib.*

SLANDER

See LIBEL AND SLANDER.

SPECIAL FUND.

COUNTY WARRANT: SPECIAL FUND. One who accepts a warrant on a special fund, cannot look to another for its payment. *Moody v. Cass County*, 477.

SPECIAL JUDGE.

SPECIAL JUDGE, ELECTION OF: STATUTE. When under Revised Statutes, section 1107, a special judge is elected by members of the bar to sit in the trial of a cause, such election is not invalidated by the fact that the record fails to recite the special fact or facts which disqualified the regular judge. *The State v. Hosmer*, 553.

SPECIAL LAW.

See LAWS.

SPECIAL TAX BILLS.

See TAXES, 11.

SPECIFIC PERFORMANCE.

1. CONTRACT: SPECIFIC PERFORMANCE OF: CONSIDERATION. Plaintiff was indebted to defendant in the sum of \$1,900, and after agreeing upon the price of cattle some time before that sold and delivered by plaintiff to defendant, and crediting it on the debt, defendant said if plaintiff would pay him what was due him, he, defendant, would make plaintiff a quit-claim deed for the land involved in suit. *Held*, there was no consideration for the promise to make the conveyance and a suit to enforce it could not be maintained. *Tucker v. Bartle*, 114.
2. EQUITY: SALE OF LAND: SPECIFIC PERFORMANCE. A court of equity will decree the specific performance of a contract for the sale of land against one who accepts a deed with the knowledge on his part, of the right of another to enforce such specific performance against the grantor. *Thompson v. Henry*, 451.

STATUTES CITED AND CONSTRUED.

REVISED STATUTES OF 1879.

Section 362, see page 23.
 Section 833, see page 90.
 Section 835, see page 90.
 Section 1312, see page 669.
 Section 1625, see page 543.
 Section 1650, see page 194.
 Section 1884, see pages 52, 134.
 Section 2144, see page 629.
 Section 2280, see page 298.

Section 809, see page 160.
 Section 834, see page 90.
 Section 1107, see page 553.
 Section 1564, see page 553.
 Section 1649, see page 145.
 Section 1814, see page 669.
 Section 2121, see page 164.
 Section 2203, see page 432.
 Section 2403, see page 456.

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| Section 2505, see page 548. | Section 2787, see page 134. |
| Section 3040, see page 123. | Section 3060, see page 501. |
| Section 3256, see page 298. | Section 3378, see page 456. |
| Section 3570, see page 502. | Section 3582, see page 502. |
| Section 3583, see page 502. | Section 3671, see page 599. |
| Section 3980, see page 660. | Section 4017, see page 249. |
| Section 6837, see page 169. | Section 7023, see page 156. |
| | Section 7045, see page 485. |

WAGNER'S STATUTES, 1872.

Page 697, § 1, see page 642.

Page 1207, § 221, see page 526.

GENERAL STATUTES, 1865.

Chapter 63, § 19, see page 575.

REVISED STATUTES, 1855.

Page 427, § 32, see page 575.

Page 1365, § 10, see page 477.

ACTS OF 1868.

Page 93, see page 41.

ACTS OF 1881.

Page 189, see page 41.

ACTS OF 1883.

Page 38, see page 64.

STATUTE OF FRAUDS.

STATUTE OF FRAUDS. The statute of frauds does not make an agreement in writing obligatory because it is in writing. If not binding as a verbal agreement before the statute because of want of consideration, reducing it to writing imparts to it no validity. The statute simply declares that no action shall be brought upon certain contracts unless reduced to writing. *Tucker v. Bartle*, 114.

SUBSTITUTION.

PRACTICE IN SUPREME COURT : ASSIGNMENT OF JUDGMENT : SUBSTITUTION.
Where one, in his lifetime assigns a judgment in his favor and dies
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pending an appeal to the supreme court, the assignee will be substituted as a party in his stead in the latter court. R. S., sec. 3671. *Neilon v. The K. C., St. J. & C. B. Ry. Co.*, 599.

SUPERSEDEAS.

See APPEALS, 3.

SURFACE WATER.

RAILROADS: EMBANKMENT: OBSTRUCTION OF SURFACE WATER: DAMAGES.

Where a railroad company condemns land for its right of way by proper methods, and without negligence, unskilfulness, or mismanagement, constructs its road, and the embankment therefor, obstructing no natural channel of water thereby, the injuries done by such embankment, by causing water to flow over the land of adjoining proprietors, will be regarded as the natural incidents and consequences of that which the corporation, by reason of condemning the land, had acquired the lawful right to do. For such injuries no action will lie, damages for them being assumed to be included in those already assessed. *Moss v. The St. L., I. M. & S. Ry. Co.*, 86.

TAXES.

1. INJUNCTION: ILLEGAL TAXES: CLOUD UPON TITLE. Injunction is the proper remedy to prevent the sale of real estate for illegal taxes, whereby a cloud would be cast upon the title. *The North St. Louis Gymnastic Society v. Hudson*, 32.
2. SCHOOL BUILDING, EXEMPTION FROM TAXATION. A school building exempted from taxation "so long as it is used only for the purposes of education" is not made taxable by the renting of a room therein for other purposes, where the proceeds thereof are used exclusively for the benefit of the school. *Ib.*
3. MANDAMUS. Mandamus will lie to compel the county clerk to assess the school taxes of a district on the taxable property therein according to its legal limits. *The State ex rel. School District No. 6 v. Riley*, 156.
4. TAXES: ACTION TO ENFORCE LIEN FOR: STATUTE. The "owner of the property," against whom, under Revised Statutes, section 6837, actions to enforce liens for taxes must be brought, is the person appearing of record to be the owner, in the absence of notice to the contrary, and unless the suit is against such owner a sale under a judgment therein will convey no title. *Cowell v. Gray*, 169.
5. LAND, SALE FOR TAXES: CESTUI QUE TRUST: REDEMPTION: EJECTMENT. Where a deed of trust is of record and the *cestui que trust* was not made a party to the tax suit, he may redeem the land by paying off the judgment and may thus assert his title under the deed of trust. But in ejectment, where the pleadings present, as the only issue, the question of the mere legal right to the possession, the title under the judgment for taxes will prevail as against the one claimed under the deed of trust. *Ib.*

6. **BACK TAXES : STATUTE : JURISDICTION : JUDGMENT.** In an action to collect back taxes, under the act of 1877, the circuit court does not exercise its jurisdiction in a special or summary manner, and its judgments therein are entitled to the same presumptions as attend its ordinary judgments. *Brown v. Walker*, 262.
7. ——— : ——— : ——— : ———. In such a suit a single judgment against several distinct lots is erroneous, but the objection does not go to the jurisdiction. *Ib.*
8. ——— : **EJECTMENT : JUDGMENT.** In an ejectment suit, the fact that in a back tax suit, a single judgment was rendered against distinct lots, cannot be shown by parol for the purpose of impeaching such judgment. *Ib.*
9. ——— : **IRREGULARITIES : SHERIFF'S DEED.** Mere irregularities in the suit, which led to a sale under execution, do not invalidate the sheriff's deed. *Ib.*
10. ——— : **IMPERFECT DESCRIPTION : EVIDENCE.** An imperfect description of land contained in the tax bill, judgment, execution and sheriff's deed, may, if the ambiguity is latent and susceptible of oral explanation, be made certain by extrinsic evidence; and it is sufficient if the description is such that the land can be located by one acquainted with the plats and surveys. *Ib.*
11. **JURISDICTION : SPECIAL TAX BILLS : CIRCUIT COURT OF JACKSON COUNTY.** The circuit court of Jackson county has concurrent jurisdiction with the recorder of Kansas City and justices of the peace of actions to enforce the liens of special tax bills, when the amount sued for is three hundred dollars, or less (overruling *Williams v. Payne*, 80 Mo. 409). *Tackett v. Vogler*, 480.
12. **TAX DEED.** The objection that the tax deed by the city collector of Kansas City did not show on its face that the land was sold at the collector's office; and that it was void on its face; held, not well taken. *Skinner v. Williams*, 489.
13. ——— : **STATUTE OF LIMITATIONS.** The statute of limitations begins to run in favor of a tax deed, not void on its face, from the time it is recorded. *Ib.*
14. **SALE OF LAND FOR TAXES : VOID DEED.** Land offered for sale for taxes and forfeited to the state for want of bidders could not, under the revenue law of 1872 (W. S. chap. 118), be sold again on the same day, and where a tax deed shows that it was so sold, it is void on its face. *Mason v. Crowder*, 526.
15. **LAND, SALE FOR TAXES : SPECIAL STATUTE OF LIMITATIONS.** The three year's special statute of limitations (W. S., sec. 221, p. 1207), in cases of land sold for taxes, is no bar to a recovery by the former owner where the purchaser has not been in possession three years after the recording of the tax deed and before the commencement of the action against him. *Ib.*

On Re-hearing.

16. **TAX DEED VOID ON ITS FACE: LIMITATIONS.** A tax deed void on its face will not set such special statute of limitations in motion. *Ib.*
17. **CONSTITUTION: RAILROAD TAX: STATUTE.** Section 32, page 427, Revised Statutes, 1885 (R. S., 1865, chap. 63, sec. 19), which provided that: "If any of the taxpayers in any county or city in which a railroad tax shall be levied, shall have subscribed in good faith to the capital stock of any railroad to which the county shall have subscribed, the said taxpayers shall be entitled to a deduction on the amount assessed against them respectively, in proportion to the amount of their *bona fide* subscriptions, until the amount of such credits or deductions shall equal the amount of their subscriptions, after which they shall be subject to pay their railroad tax as other persons," was repugnant to the provisions of the constitution of 1865, and hence invalid under that instrument. *Cock v. Stewart*, 576.

TAXATION.See **TAXES.****TAX DEED.**See **DEEDS.****TAXES**, 12, 13.**THREATS.**See **CRIMINAL LAW**, 3.**TOWNSHIP RAILROAD AID ACT.**See **RAILROADS**, 1.**TRANSFER OF CAUSES.**

CONSTITUTION: ST. LOUIS COURT OF APPEALS: TRANSFER OF CAUSES TO SUPREME COURT. The general assembly was authorized, by virtue of the amendment to the constitution of 1884, concerning the judicial department, to transfer to the Supreme Court from the St. Louis court of appeals all causes pending in the latter court on January 1, 1885, and which were subject to final review in the Supreme Court. *In re Garesche*, 467.

TRANSPORTATION.See **RAILROADS**, 8, 9.

TRUSTS AND TRUSTEES.

1. ——— : PRECATORY TRUST. A precatory trust is not to be inferred from the expressions of confidence or desire on the part of the testator contained in the will regarding the use to be made of the property devised or bequeathed, unless it fairly appears from the will that the testator contemplated and intended to create such trust, and especially no such trust will be implied when it clearly appears from the will that the testator intended to give the devisee full discretion in the use of the property. *Corby v. Corby*, 371.
2. LIFE ESTATE : TRUST. A condition annexed to a devise and bequest of a life estate to a wife, that the testator leaves it to her discretion after providing for her own wants and comforts to give to such of his relations such aid or assistance as she may of her own will think proper and just, *held* not to constitute an expression of desire or confidence from which a trust may be implied, and that under this will the widow holds the life estate absolutely and not subject to any trust whatever. *Ib.*
3. WILL, CONSTRUCTION OF : POWER OF DISPOSITION : RELIGIOUS USES. Subsequent clauses of the will declared that the balance of the testator's property would be given to advance the cause of religion and promote the cause of charity in such manner as the wife might think would be the most conducive to the carrying out of the testator's wishes, and empowered the widow to lease or sell property for the benefit of the estate. *Held*, that these provisions confer upon the widow no such powers of disposition as to enlarge her life estate to a fee or to constitute her a trustee for the heirs at law, the objects of the religious and charitable uses contemplated by these provisions being alleged to be illegal. *Ib.*
4. ——— : ——— : ——— : ——— : TRUSTEE. A will conferring upon the testator's widow a life estate in all his property, then declaring that the widow will give all the balance of the estate to religious and charitable uses, and finally empowering the widow to lease or sell parts of the real estate for the benefit of the estate, does not vest in the widow the fee in the property, of which the religious and charitable purposes failing by reason of their illegality, the widow will be held a trustee for the use of the heirs at law. *Ib.*
5. TRUSTEE. In order to constitute a party a trustee it is necessary to vest in that party an estate to be held in trust. *Ib.*

UNITED STATES COLLECTOR.

DEED OF, WHEN VOID ON FACE. *Dow v. Chandler*, 245.

VALUE.

See CRIMINAL LAW, 23.

VARIANCE.

See NEGLIGENCE, 8.

VENDOR AND VENDEE.

VENDOR AND VENDEE: CONTRACT, BREACH OF. Where a quantity of mineral is sold and part delivery made, and the vendee makes a resale to a third person of the residue in the vendor's hands without notifying the latter, it would be a breach of the contract for the vendor to deliver it to such third person. And if the vendee refuses to accept the residue, the vendor may sell it and recover of the vendee the difference between the contract price and that for which the mineral sold. *McClelland v. The Picher Lead & Zinc Co.*, 636.

VENUE.

CHANGE OF VENUE: DISCRETION OF TRIAL COURT. Where the court hears evidence for and against an application for a change of venue in a criminal case, based upon the ground of the prejudice of the inhabitants of the county against the defendant, its action upon the application is final, unless it is shown that it abused its discretion. *The State v. Wilson*, 134.

VERDICT.

PRACTICE, CRIMINAL: GENERAL VERDICT. A general verdict upon an indictment containing three counts, charging the same offence in different forms, is sufficient. *The State v. McDonald*, 539.

VICE-PRINCIPAL.

See MASTER AND SERVANT.

WAGER.

See CONTRACTS, 10, 11.

WAIVER.

1. ———: PARTIES: WAIVER. Unless the objection as to the insufficiency of parties is made by demurrer or answer, it is waived. *Bauer v. Berberich*, 50.
2. PLEADING: WAIVER. A plea in abatement is waived by one to the merits. *Moody v. Deutsch*, 237.
3. PARTIES: WAIVER. Objections to parties are waived unless made by demurrer or answer. *Hicks v. Jackson*, 283.

See PRACTICE, CRIMINAL, 3.

WASTE.

1. WASTE. The petition in this case held to be insufficient to charge the tenant for life with waste. *Corby v. Corby*, 371.

2. **LIFE TENANT: WASTE.** A life tenant or his lessee will be enjoined from committing waste at the suit of the owner of the fee. *Hughes v. Burriess*, 660.

WEIGHT OF EVIDENCE.

See PRACTICE IN SUPREME COURT, 7, 12.

WILLS.

1. **WILL, CONSTRUCTION OF: LIFE ESTATE.** A devise and bequest by a testator to his wife of all his property of every kind, real, personal and mixed, immediately followed by a bequest to her of all his moneys, notes, bonds, bank stock, etc., to have and to hold during her natural life construed, when taken in connection with subsequent clauses of the will which clearly show that he had not intended to convey her an absolute estate in fee, to confer upon the widow only a life estate in the realty. The words "to have and to hold during her natural life" are limitations upon the estate in the realty devised as well as upon that in the moneys, notes, bonds, etc., bequeathed. *Corby v. Corby*, 371.
2. ———: **PRECATORY TRUST.** A precatory trust is not to be inferred from expressions of confidence or desire on the part of the testator contained in the will regarding the use to be made of the property devised or bequeathed, unless it fairly appears from the will that the testator contemplated and intended to create such trust, and especially no such trust will be implied when it clearly appears from the will that the testator intended to give to the devisee full discretion in the use of the property. *Ib.*
3. **LIFE ESTATE: TRUST.** A condition annexed to a devise and bequest of a life estate to a wife, that the testator leaves it to her discretion, after providing for her own wants and comforts, to give to such of his relations such aid or assistance as she may of her own will think proper and just, *held*, not to constitute an expression of desire or confidence from which a trust may be implied, and that under this will the widow holds the life estate absolutely and not subject to any trust whatever. *Ib.*
4. **WILL, CONSTRUCTION OF: POWER OF DISPOSITION: RELIGIOUS USES.** Subsequent clauses of the will declared that the balance of the testator's property would be given to advance the cause of religion and promote the cause of charity in such manner as the wife might think would be most conducive to the carrying out of the testator's wishes, and empowered the widow to lease or sell property for the benefit of the estate. *Held*, that these provisions confer upon the widow no such powers of disposition as to enlarge her life estate to a fee or to constitute her a trustee for the heirs at law, the object of the religious and charitable uses contemplated by these provisions being alleged to be illegal. *Ib.*
5. ———: ———: ———: ———: **TRUSTEE.** A will conferring upon the testator's widow a life estate in all his property, then declaring that the widow will give all the balance of the estate to religious and charitable uses, and finally empowering the widow to

lease or sell parts of the real estate for the benefit of the estate, does not vest in the widow the fee in the property, of which the religious and charitable purposes failing by reason of their illegality, the widow will be held a trustee for the use of the heirs at law. *Ib.*

8. WILL, PROBATE OF IN COMMON FORM: SETTING ASIDE WILL IN CIRCUIT COURT ON CONTEST IN SOLEMN FORM: INTERMEDIATE CONVEYANCE. A testatrix died seized of real estate, which, by her will, she devised to her husband. The will was duly admitted to probate in the probate court, but afterwards, in a proceeding by the heirs of the testatrix, instituted under the statute (R. S., sec. 3980), within five years after the probate in the probate court, the will by the judgment of the circuit court was declared not to be the will of the deceased; *held*, that a conveyance of the land by the husband, after the probate in the probate court, and before the institution of the suit by the heirs to contest the validity of the will passed no title. *Hughes v. Burriess*, 660.

WITNESS.

1. WITNESS: PHYSICIAN, COMPETENCY OF: STATUTE. Under Revised Statutes, section 4017, relating to persons who are incompetent to testify, the evidence of an attending physician, if offered by the patient or his representative, is competent. Where it is offered by the opposite party, the physician cannot testify against the objection of the patient, or his representative. *Gartside v. Insurance Company*, 76 Mo. 446, distinguished. *Groll v. Tower*, 249.
2. COMMISSION TO EXAMINE WITNESSES: REVISED STATUTES, SECTION 2144, ET SEQ. The statute (R. S., sec. 2144, *et seq.*) does not specify any state of facts upon which a commission authorized by it to examine witnesses upon interrogatories shall be granted, and its allowance is a matter largely within the discretion of the trial court or judge. *Shepard v. The Missouri Pacific Railway Company*, 629.
3. ———: PRACTICE. The adverse party cannot, at the close of the direct interrogatories, cross-examine the witness whose testimony is taken under such commission. He should file cross-interrogatories. *Ib.*

RULES FOR THE GOVERNMENT
OF THE
Supreme Court of Missouri.

Adopted at the April Term, 1877.

Chief Justice, his duty.

RULE 1. The Chief Justice shall superintend matters of order in the court room.

Motions to be written, signed and filed.

RULE 2. All motions in a cause shall be in writing, signed by counsel and filed of record.

Argument of motions.

RULE 3. No motion shall be argued unless by the direction of the court.

Taking record from clerk's office.

RULE 4. No member of the bar shall be permitted to take a record from the clerk's office without the written permission of some judge of the court.

Diminution of record, suggestion after joinder in error.

RULE 5. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

Application for certiorari.

RULE 6. Whenever a *certiorari* may be applied for, there shall be an affidavit of the defect in the transcript which it is designed to supply, and at least twenty-four hours' notice shall be given to the adverse party or his attorney previous to the making of the application.

Notices of writs of error.

RULE 7. All notices of writs of error, with the ac-



ceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and be by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Reviewing instructions.

RULE 8. In actions at law it shall not be necessary for the purpose of reviewing in the Supreme Court the action of any circuit court or any other court, having, by statute, jurisdiction of civil cases in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance be embodied in the bill of exceptions, but it shall be sufficient for the purpose of such review that the bill of exceptions state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instructions founded on it.

Bill of exceptions—whether there was evidence tending to prove an issue.

RULE 9. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the court that the same tends to prove such fact or issue.

Bill of exceptions—whether there was evidence tending to prove an issue.

RULE 10. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions, detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the court that

it does not so tend, which bill of exceptions shall be allowed by the court by which the cause is tried.

Exceptions to admission or exclusion of evidence.

RULE 11. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

Bill of exceptions in equity cases.

RULE 12. In cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

Rule as to making out transcripts.

RULE 13. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (unless an exception is saved to the regularity of the process, or its execution, or to the acquiring by the court of jurisdiction in the cause), in making out transcripts of the record for the Supreme Court, set out the original or any subsequent writ or the return thereof; but in lieu thereof shall say (e. g.) "summons issued October 2, 1871, executed October 5, 1871," and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleading as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter touching the organization of the court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by the bill of exceptions.

Presumptions in support of bills of exceptions.

RULE 14. The only purpose of a statement, in a bill of exceptions, that it sets out all the evidence in a cause, being that the Supreme Court may have before it the same matter which was decided by the court of first instance,

it shall be presumed as a matter of fact in all bills of exceptions, for the future, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Abstracts and briefs to be filed.

RULES 15 and 16 (as consolidated and amended at the April term, 1884). In all cases the appellant or plaintiff in error shall file with the clerk of this court on or before the day next preceding the day on which the cause is docketed for hearing, seven copies of an abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for the respondent or defendant in error, at least *thirty* days before the day on which the cause is docketed for hearing; and the counsel for the respondent or defendant in error shall, at least *ten* days before the day the cause is docketed for hearing, deliver to the counsel for appellant or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall on or before the day next preceding the day on which said cause is docketed for hearing, file with the clerk of this court seven copies of the same, and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the clerk.

Citing authorities in briefs.

RULE 17. In citing authorities, in support of any proposition, it shall be the duty of the counsel to give the names of the parties to any case cited from any report of the adjudged cases, as well as the number of the volume and the page where the same will be found; and when

SUPREME COURT RULES.

v

reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, section, paging and side paging shall be set forth.

Appellant's brief to allege errors complained of.

RULE 18. The brief filed on behalf of the appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted at the argument to errors not thus specified, unless for good cause shown the court shall otherwise direct.

Failure to comply with rules 15 and 16.

RULE 19. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with rules numbered 15 and 16, the court, when the cause is called for hearing, will dismiss the appeal or writ of error ; or at the option of respondent or defendant in error, continue the cause at the costs of the party in default.

Agreed cases.

RULE 20. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defence and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligibly present to the Supreme Court, or any appellate court, the matters intended to be reviewed ; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in all appellate courts, and the judgment rendered in the court of first instance shall be affirmed or reversed according to the opinion entertained by the Supreme Court respecting the same.

Motion for rehearing.

RULE 21. Motions for a rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute,

or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel, but no motion for a rehearing shall be filed after the final adjournment of the court.

Motion for affirmance.

RULE 22. On motion for affirmance under section 49, article 13, chapter 110, Wagner's Statutes, the mere fact that the appellant has on file, or presents a copy of the transcript at the time such motion is made, shall not *of itself* be deemed "good cause" within the meaning of said section.

Former rules rescinded.

RULE 23. All rules not included in the foregoing enumeration are hereby rescinded.

ADDITIONAL RULES.

RULE 24. No writ of error from this court to the court of appeals can be issued by the clerk of this court in vacation. All applications in term time for writs of error to the court of appeals, shall be accompanied by an affidavit of the attorney of record that the cause in which such writ of error is sued out, is one of which this court has appellate jurisdiction under section 12, of article 6 of the constitution; and such affidavit shall state the facts

conferring such jurisdiction, and thereupon the clerk shall issue such writ. (*Adopted at the April term, 1878*).

RULE 25. That hereafter, in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause. (*Adopted at the October term, 1878*).

RULE 26. A party, in any cause, filing a motion either to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter or by written notice, and shall, on filing such motion, satisfy the court that such notice has been given. (*Adopted at the October term, 1879*).